SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 61

E. S. EVANS, ET AL., PETITIONERS,

vs.

CHARLES E. NEWTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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[fol. 1]

IN THE

SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

Rev. E. S. Evans, et al., Intervenors, Plaintiffs in error,

v.

Charles E. Newton, et al., Defendants in error.

Bill of Exceptions—Filed May 8, 1964

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Georgia:

Be It Remembered that on February 5, 1964, there came on for hearing in Bibb Superior Court before the trial judge, the Honorable Oscar L. Long, a Motion for Summary Judgment which had been submitted by the petitioners, defendants-in-error, after which arguments and authorities were submitted to the Court by parties for each side. Thereafter, and on the 10th day of March, 1964 the said trial judge entered his order and decree granting the said motion.

To the said Order of the said trial judge the plaintiffs-in-error did except, now except and assign the ruling of the trial judge as reflected in his decree and order as being contrary to the law and facts in the case. Plaintiffs-in-error contend that said Order denies equal protection to the plaintiffs-in-error and others similarly situated as guaranteed by the Fourteenth Amendment to the United States Constitution, for the reason that said Order has the effect of prohibiting Negroes from the use of the park which is the subject matter of this litigation. Further, plaintiffs-in-error contend that said ruling, order and decree also denies to the plaintiffs-in-error, and others similarly situated, equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution,

in that, this said Court has accepted the resignation of the City of Macon as Trustees and appointed new Trustees for the purpose of enforcing the provisions of the Last Will and Testament of A. O. Bacon which contains a racially discriminatory testamentary provision and which plaintiffs-in-error contend was originally commanded by the State.

Error is further assigned to the said Order on the ground, and the plaintiffs-in-error contend, that Section 108-202, Georgia Code Annotated, 1933 Edition, has the effect of requiring that the racially discriminatory provisions of the testamentary trust which is a part of the subject matter of this litigation be declared null and void. Said Code Section reads as follows:

> 108-202. (4604) Cy pres.—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention. (110 Ga. 540, 543 (35 S.E. 639).)

[fol. 2] Plaintiffs in error further assign error to the said trial judge's said ruling, order and decree on the ground that the Acts of Georgia of 1905, page 117, commonly referred to as Georgia Code Section 69-504, hereinafter set out, is violative of the equal protection clause of the Fourteenth Amendment for the reason that said provision prescribes racial discrimination and since the racially discriminatory provision in A. O. Bacon's Last Will and Testament, the plaintiffs-in-error contend, was dictated by that unconstitutional statute which received enforcement by said statute, all in violation of the Fourteenth Amendment to the United States Constitution, Sec. 1. Said Act reads as follows:

> 69-504 (890) Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated

in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117.)

Plaintiffs-in-error specify as material to a clear understanding of the errors complained of the following portions of the record, to wit:

1. Petition, filed May 4, 1963.
2. Answer of the City of Macon, filed May 20, 1963.
3. Answer of Guyton G. Abney, J. D. Crump, T. I. Denmark and W. G. Lee, as Trustee successors under the Last Will and Testament of A. O. Bacon.
4. Motion for Summary Judgment dated May 27, 1963.
5. Motion of Rev. E. S. Evans, et al. to intervene, dated May 29, 1963, with order thereon.
6. Intervenors Petition filed June 18, 1963.
7. Amendment to Petition filed January 8, 1964.
8. Petition for intervention and order thereon dated January 8, 1964.
9. Amendment to answer and Cross Bill, with order thereon, filed January 8, 1964.
10. Amendment to answer of City of Macon, filed February 5, 1964.

11. Amendment of Intervenors' Petition, filed March 5, 1964.

12. Trial Judge's Order and Decree dated March 10, 1964.

13. Resignation of City of Macon as Trustees.

14. Acceptance of Trust filed March 12, 1964.

[fol. 3] And Now, come Rev. E. S. Evans, et al., within the time provided by law, and assigning error on all the rulings complained of as being contrary to law, tender this their Bill of Exceptions and pray that the same may be certified to and transmitted to the Supreme Court of Georgia in order that the alleged errors may be considered and corrected, all as provided by law.

Donald L. Hollowell, William H. Alexander, Attorneys for Plaintiffs-in-error.

859½ Hunter St. N.W., Atlanta, Georgia 30314, Jackson 5-8372.

[fol. 4]

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS —April 14, 1965

I do certify that the foregoing Bill of Exceptions was tendered to me on the 9th day of April, 1964, that the same is true and specifies all the evidence, and specifies all of the record material to a clear understanding of the errors complained of and the Clerk of the Superior Court of Bibb County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this Bill of Exceptions specified, and of the record in said case as are in this Bill of Exceptions specified, and certify the same as such and cause the same to be transmitted to the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 14 day of April, 1964.

O. L. Long, Judge, Bibb Superior Court.

[fol. 5] The within and foregoing Bill of Exceptions tendered this 9 day of April, 1964.

O. L. Long

[fol. 6] Acknowledgments of Service by Attorneys for Defendants-in-Error (omitted in printing).

[fol. 8] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 10] [File endorsement omitted]

[fol. 12]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

PETITION—FILED May 4, 1963

Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody, all of said State and County, in their respective capacities as members of the Board of Managers of Baconsfield, hereinafter referred to as the "Board", bring this bill in equity and name as defendants the following parties:

The City of Macon, in its capacity as Trustee under Item 1X of the Last Will and Testament of Augustus Octavius Bacon, deceased:

Guyton G. Abeny, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, Deceased, holding assets for the benefit of certain designated beneficiaries who will take the residuary estate under the terms of said Will, but subject to the provisions of Item 1X thereof as herein more fully set forth.

1.

This Honorable Court has jurisdiction of this proceeding in that all of the defendants against whom substantial relief is prayed herein are residents of Bibb County, [fol. 13] Georgia; and for the further reason that the trust assets, as hereinafter described and which form the subject

matter of this bill in equity, are situate in said State and County.

2.

Your petitioners are the duly qualified and acting members of the Board of Managers of Baconsfield, created and established under the provisions of Item 1X of said Last Will and Testament of Augustus Ocavius Bacon.

3.

The defendant the City of Macon is a municipality duly created by Act of the Legislature of the State of Georgia, and, under said Item 1X of said Will, holds, as Trustee, the legal title to that tract or parcel of land situate in Macon, Bibb County, Georgia, known as "Baconsfield", and more fully described in said Will.

4.

The defendants Guyton G. Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee are successor Trustees under said Last Will and Testament, and codicil thereto, and are duly qualified and now acting in such capacities, respectively.

5.

The Last Will and Testament of Augustus Octavius Bacon, dated the 28th day of March, 1911, and the codicil thereto, dated the 6th day of September, 1913, have been duly probated in solemn form in the Court of Ordinary of [fol. 14] Bibb County, Georgia, a copy thereof being attached hereto as Exhibits "A" and "B" and by reference made a part hereof.

6.

Under Item 1X of said Will the testator conveyed all his right, title and interest in and to Baconsfield, the parcel referred to being fully described in said Item 1X, unto

"The Mayor and Council of the City of Macon", the then designation of the same municipal corporation which is now the "City of Macon".

7.

Your petitioners show that said property was so conveyed to the defendant the City of Macon "in trust for the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon, to be by them forever used and enjoyed as a park and pleasure ground", subject however, to the restrictions, government, management, rules and control of the Board of Managers of Baconsfield, your petitioners herein.

8.

Although under the provisions of said Will, the defendant the City of Macon, as Trustee of said properties, is under a paramount duty to carry out the provisions of said trust, the Board has complete and unrestricted control and management of said property, with power to make all needful regulations for the preservation and improvement thereof, and rules for its use and enjoyment, with power to exclude at any time any person or persons of either sex, who may be deemed objectionable, or whose [fol. 15] conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of said property for the purposes contemplated by the testator.

9.

As directed in said Will, the Board has over the years confined the exclusive use of Baconsfield to those persons designated in said Will, although under the provisions thereof it has not objected to the use of said property by

the white men of the City of Macon and white persons of other communities.

10.

Your petitoners show, however, that although they have called the attention of the defendant the City of Macon to the provisions of Item 1X of said Will and its duties as Trustee thereunder, said defendant is now failing and refusing to carry out and enforce the provisions of said Will with respect to the exclusive use of Baconsfield by the white women of the City of Macon and white boys and white girls, and white men when so authorized by the Board, but on the contrary, has recently permitted and is now permitting the continuous use of said premises by members of the colored race, in direct contravention of the terms of the trust created by the testator, and under which said defendant holds title to Baconsfield, and in complete disregard and violation of th explicit mandate of the testa-
[fol. 16] tor as set forth in said Will.

11.

Your petitioners are without power to enforce the terms of said trust with respect to the aforesaid use of Baconsfield, except to request the defendant the City of Macon to comply with the terms of the Trust. If, however, a new Trustee, or new Trustees, are appointed by this Court then, if necessary, said Trustee or Trustees, by the exercise of a writ of mandamus or otherwise could require the defendant the City of Macon or other proper law enforcement officers to carry out their duties so that the terms of the trust, which the City of Macon now is violating in its capacity as Trustee, may be carried out by the new Trustee or Trustees.

12.

Your petitioners show that the aforesaid breach of duty on the part of the defendant the City of Macon, as Trus-

tee, constitutes such a violation of trust as to require its removal as Trustee.

13.

Your petitioners bring this petition for the purpose of removing the defendant the City of Macon as Trustee of said properties, and recommend to this Honorable Court, as a court of equity, that it appoint three (3) freeholders, residents of the City of Macon, to serve as successor Trustees to defendant the City of Macon and who in their capacity as Trustees, being private citizens, can and will under the law carry out the testator's wishes and intent with re- [fol. 17] spect to the use and enjoyment of Baconsfield, and the purposes for which said trust was established.

Wherefore, your petitioners pray:

(a) That process do issue in terms of law;

(b) That the defendant the City of Macon be removed as Trustee under said Will;

(c) That this Court, as a court of equity, enter a decree appointing one or more freeholders, residents of the City of Macon, to serve as Trustee or Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, with power on the part of the Board to name, subject to the approval of this Court, from time to time, a successor Trustee or Trustees upon the death or disqualification of any such Trustee, or should any such Trustee for any reason cease to serve in such capacity;

(d) That legal title to Baconsfield, as well as to any other assets now held by the defendant the City of Macon, in its capacity as such Trustee, be decreed to be in the Trustee or Trustees so appointed by this Court, and in their respective successor or successors, for the uses, purposes and trusts originally declared by the testator, Augustus Octavius Bacon;

(e) That your petitioners have such other and further relief as the Court may deem fit and proper.

Jones, Sparks, Benton & Cork, Attorneys for Petitioners.

[fol. 18] *Duly sworn to by Frank M. Willingham, jurat omitted in printing.*

[fol. 19]

EXHIBIT "A" TO PETITION

COPY OF LAST WILL AND TESTAMENT OF AUGUSTUS OCTAVIUS BACON

I, Augustus Octavius Bacon, of said State and County, being in perfect health and of sound and disposing mind and memory, and desiring to make disposition, while so capacitated, of the property which, under Providence, has been the fruit solely of my personal industry and toil, do hereby make, publish and declare this my last Will and Testament, hereby expressly and entirely revoking and cancelling all other Wills heretofore made by me.

Item 1st

I commit my soul to God, in the humble hope that in spite of my many weaknesses, imperfections, faults and misdeeds, I shall be reuinited in a happy immortality with my kindred and friends, and particularly with the members of my immediate family, to whose happiness and welfare my life has been gladly and unsparingly devoted.

Item 2nd

I direct that my body be buried in Rose Hill Cemetery in the lot recently purchased by me, and that the bodies of my two ever-lamented sons, Lamar Bacon, who died on the 21st day of December 1884 and Augustus Octavius Bacon, Jr., who died on the 27th day of November of the same year, shall be removed from the lot in which they are now

interred, and re-interred in the same lot now owned by me, and I further direct that my Trustees hereinafter named, or their successors, shall erect over the graves of myself and of my two sons, and also over the graves of all other [fol. 20] members of my family who shall die during the continuance of the trust herein created, monuments in their discretion suitable and appropriate therefor.

Item 3rd

I direct that all my just debts be paid as early as practicable after my death.

Item 4th

My household and kitchen furniture in the main dwelling house, I give and bequeath to my wife, Mrs. Virginia Lamar Bacon, during the full term of her natural life, to be thereafter disposed of by her will as she may direct.

Item 5th

My household furniture in the little cottage commonly called "The Hut" which I have personally occupied for years, as well as all of my books of every kind whereever located, together with all of my papers, pictures, jewelry, personal apparel and all other similar personal effects, I give to my two beloved daughters, Mrs. Mary Louise Bacon Sparks, and Mrs. Augusta Lamar Bacon Curry, to be divided between them as they shall agree with each other, requesting that they give or transmit to their several children such of said articles as it may be thought they would prize and preserve.

Item 6th

All of my estate both real and personal, of every description, and wherever situate, excepting therefrom only so much thereof as is otherwise disposed of by this Will, either in the clauses precedent or subsequent hereto, I [fol. 21] hereby give, bequeath and devise unto my tried

and trusted friends Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, all of my said bounty, in trust for the persons and purposes hereinafter named and specified, with the estates and remainders, and with the powers and limitations herein specifically designated and set forth as follows:

(a) Except as otherwise specified in this Will, all of the corpus of my said property—including both that held by me in trust, and that held in fee simple—whether consisting of the property as it exists at the time of my death, or of the property into which it may be subsequently converted, or of property subsequently acquired for my estate, shall be held by the said Trustees and their successors in trust for the sole use, benefit and enjoyment of my wife, Mrs. Virginia Lamar Bacon, and of my two daughters, Mrs. Mary Louise Bacon Sparks and Mrs. Augusta Lamar Bacon Curry, for and during the term of their natural lives, and after their several deaths, with the several remainders as herein specified and provided, and to the uses, benefit and enjoyment of the beneficiaries specified thereunder; and to fully effect the same, the said Trustees shall annually, so long as the said Mrs. Bacon, Mrs. Sparks and Mrs. Curry shall all remain in life, pay to each of them one-third of the net annual revenue derived from said property after the payment of all [fol. 22] proper and legitimate expenses incident thereto.

(b) Upon the death of Mrs. Virginia Lamar Bacon, I direct that all of the property specified and embraced within this Item 6th of my Will, including the one-third theretofore held in trust for Mrs. Virginia Lamar Bacon, shall be by the said Trustees divided into two equal parts, one of which parts shall be held by said Trustees in trust for the sole use, benefit and enjoyment of my daughter, Mrs. Mary Louise Bacon Sparks, during the full term of her natural life with the re-

mainders in the same as hereinafter specified, and the net revenues from the same shall during her life be annually paid to her; and the other of said equal parts shall be held by said Trustees in trust for the sole use, benefit and enjoyment of my daughter, Augusta Lamar Bacon Curry during the full term of her natural life, with the remainders in the same as hereinafter specified, and the net revenue from the same, shall during her life, be annually paid to her.

(c) Upon the death of my daughter Mary Louise Bacon Sparks, I direct that the portion of the property embraced in this Item 6th of my Will and held in trust for her during the term of her natural life as aforesaid shall thereafter be held by said Trustees and their successors of the sole use, benefit and enjoyment of the [fol. 23] children now in life of my said daughter, Mary Louise Bacon Sparks. During the full term of the life of Willis B. Sparks, Senior, who married my said daughter, Mary Louise, with remainder after his death to the children of the said children now in life of my said daughter Mary Louise, to-wit: the children of Augustus Octavius Bacon Sparks, Willis B. Sparks, Junior; Virginia Lamar Sparks and of Garton Sparks. But if at the time of the death of my daughter Mary Louise, and any one or more of the said children of my said daughter Mary Louise shall then be in life, the proportionate interest of each of said children of my daughter Mary Louise shall then vest in said child in fee simple, and thereupon the said trust to that extent shall cease and terminate. If during the life of the said Willis B. Sparks, Senior, and after the death of my daughter, Mary Louise, any one of her said children hereinbefore named, shall die leaving neither husband, nor wife, nor child, the interest of said child so dying shall thereupon descend to, and enure in equal parts to the benefit of the survivors of the said children, and shall thereafter during the continuance of this trust, be held by the said Trustees for the use,

benefit and enjoyment of the survivors of the said children. The intent and purpose of this provision of my Will is that in no event and under no circumstances shall the trust cease and the title in and to said prop- [fol. 24] erty, or any part thereof, vest in fee simple, in either of my said daughter Mary Louise, or in any of her descendants, during the term of the natural life of the said Willis B. Sparks, Senior; and further that the remainders hereinbefore specified shall be preserved and take effect after the death of the said Willis B. Sparks, Senior.

(d) Upon the death of my daughter, Augusta Lamar Bacon Curry, I direct that the portion of the property embraced in this Item, and held in trust for her during the term of her natural life as aforesaid, shall thereafter be held by said trustees and their successors, for the sole use, benefit and enjoyment of the children now in life of my said daughter, Augusta Lamar, to-wit: Shirley Holcomb Curry, Marie Louise Curry and Manly Lamar Curry, until her youngest child, the said Manly Lamar Bacon Curry, shall reach the age of twenty-one years, when the proportionate part of said property, shall vest in each of said children, and the trust, to the extent thereof in said property, shall thereupon cease and determine. But if either of the said named children or my said daughter, Augusta Lamar, shall, without leaving husband, or wife or child, die before the said Manly Lamar Bacon Curry shall reach, or would, if in life, reach the age of twenty-one years, the portion of the said child so dying shall thereafter be held in trust for the use, benefit and enjoyment of the survivors of the said named children; [fol. 25] and if either of the said named children of my said daughter, Augusta Lamar, shall, before the said Manly Lamar reaches, or would, if in life, reach the age of twenty-one years, die leaving a child or children in life, the portion of the child so dying shall be

held in trust for his or her surviving child or children until they severally arrive at the age of twenty-one years.

Item 7th

To my said Trustees hereinbefore named, and to their successors, I give full power and authority to sell so much of the property of my estate as is embraced in the foregoing Sixth Item of this Will, both real and personal or any part thereof in their discretion, and to make conveyances thereof, with full and perfect title free from said trusts, limitations and remainders, to the purchasers of the same without any authority asked from or granted by any court, or officer or any person whomsoever; said sales to be at either public or private sale, and no such terms as they in their discretion shall determine, and either with or without public or other advertisement of the same. But the net proceeds of all such sales, except as otherwise provided in this Will, shall be by the said Trustees reinvested in other real estate in the State of Georgia; which said real estate, when thus purchased for reinvestment, shall in each and every particular be held in the name of said Trustees or their successors subject to the same trusts and uses, and limited to the same estates and remainders as are specified in the foregoing Sixth Item of this Will; and the [fol. 26] title deeds taken to said real estate shall, by reference to this Will express that the same is conveyed for said trusts and uses, and with the said estates and remainders as are herein specified. The books of said Trustees shall contain an accurate and complete statement of all real estate and other property sold and purchased on account of said trust estate, and also accurate accounts of all monies received and disbursed on account of said estate. I urge the said Trustees in this connection not to sell the real property of my estate hurriedly, but only when the same can be done to the best advantage, as the said property can in large part be used in such manner as to provide revenue, and the said property will in a reasonable short

time be very valuable for sale for residence purposes. The power to sell I intend to embrace in all its features and requirements and exemptions, the power to lease or rent.

Item 8th

During the lives of Mrs. Virginia L. Bacon and of my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, it is my will that they shall each receive annually through said Trustees, from my estate at least the full sum of $1,200.00. If the one third of the net annual revenues derived from my estate does not in any year furnish an amount sufficient to pay the full sum of $1,200.00 to each of them, I direct that the deficiency be made up by taking from the amount received from the sales of property embraced in Item Sixth of this Will, as much as will be necessary to give to each of the three, the said full sum of $1,200.00.

[fol. 27] Upon the death of their mother, Mrs. Virginia Lamar Bacon, it is my will that each of my said daughters Mary Louise and Augusta Lamar, shall receive annually, through said Trustees, from my estate at least the sum of $1,800.00. If the property set apart for the use and enjoyment of each of my said daughters upon the death of their mother, to be held as hereinbefore provided in trust for each of them during life, shall not in any year furnish an amount of net revenue sufficient to pay to each or either of them the full sum of $1,800.00, I direct that the deficiency be made up by sales of property so set apart; so that any deficiency in the annual amount due to my daughter Mary Louise shall be made up by sales of property set apart for her use; and in like manner any deficiency in the annual amount due to my daughter Augusta Lamar shall be made up by sales of property set apart for her use; and the property so sold shall, as hereinbefore provided, be thereby freed from said trusts and the estates, limitations and remainders thereunder. The purpose of this provision is not to limit my wife and daughters to the amount named, but to ensure to them at least said amounts in case the net revenues shall be insufficient for that purpose.

Item 9th

I direct that there by said Trustees laid off and accurately defined and permanently marked by enduring monuments, the following described part of my farm which is situated in part within and part without the corporate limits of the City of Macon, and known as "Baconfield," the same to be set apart and dedicated to the purposes, uses and enjoy-[fol. 28] ments as hereinafter more fully set forth and detailed. The said part of the property thus set apart is bounded as follows: there is on the Southeastern part of my said farm a four acre rectangular tract which formerly belonged to James Pepper, and which is commonly known as the "Pepper Place" the same having been purchased and added to my farm. For this description, beginning at the South-eastern corner of said rectangular tract, the boundary line of the property runs in a Northerly direction along the Eastern boundary line of said Pepper Place and thereafter in a direct prolongation of the same to a point nine hundred and sixty-three feet and five-tenths from the said starting point, thence in a slightly northwestern direction sixty-three feet and five-tenths, thence in a northerly direction three hundred and thirty-two feet across Boulevard Baconfield to a point on the Western side of said Boulevard, thence three hundred and sixteen feet along the western border of said Boulevard to a point on the same immediately opposite the junction of said Boulevard and Gray Street, thence, in a direction a little West of North, twenty-four hundred and eighty feet to an elm tree, thence at right angles sixteen hungred and sixty-two feet to the bank of the Ocmulgee River, thence in a Southeasterly direction along the bank of said river thirty-three hundred and ninety seven feet, thence in a direct line to the Southwest corner of the said Pepper lot, thence four hundred and thirty-seven feet along the Southern boundary line of said Pepper lot to the original starting point; the said metes and bounds of the said tract of land being correctly platted and defined on a map of the same hereto attached, made [fol. 29] by H. D. Cutter and upon which for the purpose of

identification, I have endorsed my original signature. The larger part of the property thus described and bounded is a portion of a trust estate originating with me and created solely by me for the benefit of my wife and children during my life and for their benefit and use after my death in such estates and with such remainders as should be specified and directed by me in my last Will and Testament. For the purpose of carrying out fully the purpose and intent of the trust thus created, I hereby give, bequeath and devise the said property consisting of the tract of land hereinbefore described and bounded and platted on said map unto the said Trustees, viz. Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, in trust for the sole joint use, benefit and enjoyment of my wife, Virginia Lamar Bacon, and of my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, during the term of their natural lives, as follows: So long as they shall all live they shall be entitled to the equal enjoyment and use of the same including all revenues and profits in any way derived therefrom. When Mrs. Virginia Lamar Bacon shall die, the use, benefit and enjoyment of the entire property herein described and bounded shall belong to my two said daughters equally, including all revenues and profits in any way derived from the same, during the full term of their natural lives. Upon the death of either of my said daughters, her interest in said property shall be enjoyed by her children and the survivors of them until the death of my last surviving daughter. Upon the death of my said wife and of each of my said daughters, [fol. 30] and of the last survivors of them, the trust created in this property by this said Ninth Item of this Will in the said tract of land thus defened, bounded and platted shall cease, and thereafter shall close all interest and right of enjoyment of any person or persons whomsoever in said property except as hereinafter specified and provided, to-wit: When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immedi-

ately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for: the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. [fol. 31] The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person or persons of either sex,

who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsisting with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property the white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for [fol. 32] women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield, beginning at the north Macon bridge and including the "Pepper Place," also all of said property lying on the river which is properly classed as low lands, or river bottom; but in no event and under no circumstances shall any part of the property herein conveyed and bounded and platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified. If it should be held that said property is subject to taxation when devoted to such uses as a park or pleasure ground, I request that proper steps be taken to secure from the State of Georgia a perpetual release from all liability to taxation.

I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

I am, however, without hesitation in the opinion that in their social relations the two races (white and negro) [fol. 33] should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified, by my gratitude to and love of the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December 1884 and Augustus Octavius Bacon, Jr. who died on the 27th day of the same year. And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated. I direct that said property during the lives of my said wife and my two said daughters shall continue to be known and designated as "Baconsfield" and that after their death, it shall be forever and perpetually known as "Baconsfield," and shall be so designated in all matters, documents and papers relating thereto.

While I make no restrictions, I request that the Managers will preserve on the property my present house residence, and the smaller house nearby which I have personally occupied for so many years and which I have called "The Hut" the said houses to be used to the best advantage, and in such localities on the property as may be most desirable, for the comfort, convenience and pleasure of the white women, girls, boys and children herein designated: and I trust that the managers of said property may find it to the best inter-

[fol. 34] est of those who are to enjoy this property that there shall be perpetually preserved the present woods and trees upon the same. And I specifically direct that during the said trust estate in said property for the uses and benefit of my wife Virginia Lamar Bacon and of my two daughters Mary Louise Bacon Sparks, and Augusta Lamar Bacon Curry, neither the said residence house nor the said smaller house known as "The Hut" shall be removed or destroyed or materially altered by addition or otherwise, but that the same during the entire terms of said trust estate for life, be carefully preserved in their present condition; and further that during the terms of said trust estates and during the lives of my said wife and my two said daughters, the woods and trees on said property be carefully preserved, and that no one of them be cut down or destroyed for any purpose whatsoever; and I further specifically provide and direct that the said trustees hereinbefore named and their successors shall not have power or authority to sell or otherwise alienate or dispose of the tract of land thus described, bounded and platted or any part thereof during the continuance of said trust or trusts or at any other time, under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby expressly denied to them, and to all others.

Item 10th

To make still further provision for the preservation, management and improvement of the property set apart in the foregoing 9th Item of this Will as a park and pleasure grounds as aforesaid, I will and bequeath to the Mayor and Council of the City of Macon, and to their successors, ten [fol. 35] bonds of the Macon Railway and Light Co., each of said ten bonds being for $1000.00 and in the aggregate being for $10,000.00 and bearing interest at the rate of five per cent per annum, and at present in the custody of The Riggs National Bank in Washington, D. C., the said bonds and all monies or things of value resulting and derived therefrom to be held by the said Mayor and Council

of the City of Macon and their successors for the following trusts and uses, to-wit: So long as the property known and to be known perpetually as "Baconsfield," specified, bounded and described in the foregoing 9th Item of this Will, shall continue to be held in trust by the Trustees named in the said foregoing 9th Item and their successors for the use and benefit of my said wife and my two said daughters, or either of them, until the said property shall vest in the Mayor and Council of the City of Macon to be held in trust for the purposes specified and for the uses directed in the said 9th Item. The said Mayor and Council of the City of Macon shall as said Trustees collect the semi-annual interest which shall be paid on said bonds, and as promptly as practicable invest the same in interest bearing bonds to be added to and included in said trust fund; and the interest received on the additional bonds thus purchased, and from all other bonds additional thereto resulting from and accruing to said fund, shall in like manner be reinvesting in interest bearing bonds, so that all income from said fund or in any manner accruing to said fund shall as far as practicable be semiannually compounded and added to the principal of the original fund. When the said Trustees named in the said 9th Item and their successors shall cease [fol. 36] to hold said property in trust for my said wife and my said daughters, as provided in the said 9th Item, and when as therein provided the Mayor and Council of the City of Macon shall as Trustees be vested with said property and the title to the same for the uses therein set forth, they shall as may be required for the preservation, maintenance and improvement of said park and pleasure ground, pay over to the Board of Managers hereinbefore provided for, the income subsequently received from said trust fund constituted of and resulting from the said bonds; and all income derived from said property, and from said bonds, and the proceeds thereof, when not required for the needs of said park and pleasure ground, be added to the said principal fund, to the end that from increased income it may be in greater and ever increasong degree beautiful and developed and equipped for the benefit and enjoyment of those for

whose pleasure and happiness it is designated. If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said [fol. 37] park and pleasure ground, unless said required power is conferred by appropriate legislation. Should the Mayor and Council of the City of Macon at any time consent to do so, then I direct that they be authorized to receive the fund constituted of said bonds and all additions thereto and the proceeds thereof, and cover the same into the treasury of the City, in consideration of the perpetual obligation of the City to be evidenced by its bond or otherwise, to provide and pay over annually to the said Board of Managers an amount equal to five per centum interest upon the sum thus covered into the treasury, to be devoted by said Board to the uses hereinbefore specified. In making this bequest as expressed in this and the preceding item of my Will, I have been mindful to preserve the full use and enjoyment of the real estate to my wife and daughters during their natural lives, and also of the fact that the entire bequest in value represents a very much smaller proportion of my estate than would have been the share in it of my two sons had they lived. As there will be no one of my descendants who now bears my name either by right or birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys

of their own race in the community of which they once formed a happy part.

Item 11th

For many years I have had someone employed to care for the cemetery lot at Midway Church in Liberty County in [fol. 38] which my father, Rev. Augustus Octavius Bacon and my mother Mary Louise Bacon and my only brother, Samuel Jones Bacon, are buried, and also my uncle, Dr. Albert Summer Bacon, the small sum of $10.00 per year having been found sufficient for that purpose. I direct that the payment of said amount, or more if required, be made annually for said purpose, by the said trustees of my estate, and that the same be made a perpetual charge upon the property of my estate when distributed to my devisees and legatees; and I conjure my descendants to the remotest generation to so provide that the said cemetery lot shall always be properly preserved and cared for. I make a like bequest and request for the proper care of the burial lot of my wife's family in Rose Hill Cemetery in Macon, and for the proper care of my own cemetery lot in Macon.

Item 12th

The provision herein made for my wife, Mrs. Virginia Lamar Bacon, is in all its parts, both as to realty and personalty through said Trustees, intended to be in lieu of dower and first year's support. If she should refuse to accept the same and elect to take her dower, then it is my will that the remainder interest in the real estate set apart as her dower shall vest in my said Trustees for the trusts and estates and uses as hereinbefore provided should obtain following her death.

Item 13th

I direct that said Trustees shall be authorized to use a portion of the money realized from the sale of lots for residences or other purposes, in the improvement of other [fol. 39] portions of the property with the view of secur-

ing increased revenue therefrom for the enjoyment of my wife and daughters and their children; but I desire that this power shall be sparingly exercised and only in case where the prospects of such increased revenue is reasonable certain.

Item 14th

In case of the occurrence of a vacancy among the said Trustees herein named and appointed in the Sixth Item of this Will, I direct that it be filled by a suitable person selected by the remaining Trustees, such selection and the acceptance of the same to be evidenced in writing, and to be recorded upon the Minutes of the Superior Court of Bibb County upon petition by said remaining Trustees, and order of the Court granting authority to do so.

The said Trustees and their successors shall not be required to give any bond for the proper and faithful performance of their duties under said trust, or for any other purpose whatsoever, nor shall they be required to make any returns of property or of money received and disbursed, or of any other actings and doings under said trust to any court or other authority, but shall only be required to keep accurate books of accounts of property and of receipts and disbursements which shall be open to the inspection of the beneficiaries under this Will. They shall also make to the Mayor and Council of the City of Macon annual reports, relative to the conditions and preservation of the property herein designated as "Baconsfield" and embraced within the provisions of the Ninth Item of this Will, and particularly as to the preservation of the buildings and trees [fol. 40] upon the same. I have confidence that my said Trustees will execute this trust as economically as practicable, and I recognize and desire that such one of this number as may be charged more immediately with the work shall, through commissions or sales or otherwise, receive a fair compensation for his time and labor expended thereon.

Item 15th

I am firmly convinced both from observation and personal experience that it is unwise for personal relatives to have business transactions and business relations with each other, and I specifically direct that, except as provided in the ninth Item of this Will in the case of the said Board of Managers, no blood relation of myself, and more particularly no one related to me by marriage, and most particularly no present or any future husband of said daugters or of either of my granddaughters, either during the lives of my said daughters or granddaughters, or at any time thereafter, shall ever be either actually, nominally or practically or practically an executor, administrator or trustee for the management or control of my estate, or of any part of the property thereof, or hold any position, authority or employment as a manager, representative, or agent in the control or management of the property or any part thereof; or of any business or interest connected with the same or related thereto.

Item 16th

I hereby nominate, constitute and appoint my said long tried friends, Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, all of said State and County, Executors of this my Last Will and Testament. [fol. 41] They shall not be required to make any inventory or appraisement of the property of my estate, nor to have the same made by others, excepting only such as shall be made voluntarily by them to be entered on their private records for the information of themselves and of the beneficiaries under this Will. Nor shall the said Executors be required any bond, or to make any return of or concerning the property of my said estate, or the disposition or management of the same or of its revenues, or any other returns of any kind whatsoever to any court, officer or authority whatsoever.

In witness whereof I, the said Augustus Octavius Bacon, at Macon Georgia on this the twenty eighth day of March

in the year Nineteen hundred and eleven, to the foregoing thirty two pages written with my own hand, and containing my last Will and Testament, do hereby set my hand and affix my seal in the presence of the attesting witnesses, hereunto subscribing as such by my request.

/s/ Augustus Octavius Bacon (Seal)

Signed, Sealed, Declared and Published by Augustus Octavius Bacon as his last Will and Testament in the presence of the undersigned who, each of us, at his request, subscribed our names as witnesses thereto in the presence of said Testator and in the presence of each other—this the twenty eighth day of March, in the year Nineteen hundred and eleven; the words "including both that held by me in trust, and that held in fee simple," when they occur on the fourth page, and the word "authority," when it occurs on the tenth page, having been in each instance interlined before signing.

[fol. 42]

/s/ J. M. Hancock

/s/ Sidney W. Hatcher

/s/ Walter Defore

[fol. 43]

Exhibit "B" to Petition

CODICIL

City of Washington
District of Columbia

I, Augustus Octavius Bacon, of the State of Georgia and County of Bibb and now temporarily sojourning at Washington in the District of Columbia, being of sound and disposing mind and Memory, do hereby make, declare and publish this first codicil to my last Will and Testament heretofore made, published, and declared by me on the 28th day of March 1911.

Item 1st

I revoke so much of the second item of my said Will as directs that my body shall be interred in the cemetery lot recently purchased by me, and also that part in said item which directs that the bodies of my two deceased sons shall be disinterred and reinterred in said lot.

Item 2nd

I revoke so much of my said Will as nominates and appoints Warren Roberts as a trustee under the same, and also so much thereof as nominates and appoints the said Warren Roberts as Executor of my said Will, and in his stead I hereby nominate and appoint my tried and trusted friend Minter Wimberly of said County of Bibb, both as Trustee under my said Will and as executor thereof; hereby expressly conferring upon the said Minter Wimberly, both as said trustee and as said executor, all the powers, privi- [fol. 44] leges, rights, immunities and exemptions heretofore conferred in said Will upon the said Warren Roberts, both as Trustee and as Executor as aforesaid.

Item 3rd

My beloved daughter, Augusta Lamar Bacon Curry, having died, it is my Will and I hereby direct that her children, Shirley Holcomb Curry, Marie Louise Lamar Curry and Manly Lamar Bacon Curry, shall in the disposition of my property, stand in the place of their Mother, and that the interest in my estate which she would have taken under my said Will shall, upon my death, enure to them and be held in trust for them and each of them in the same manner and to the same extent and subject to the same trusts, limitations, conditions and remainders as they would have taken under the provisions of my said Will had my daughter Augusta survived me and had they upon her subsequent death taken the same remainder interests prescribed for them in my said Will, and my said trustees shall hold said interests for them with the same trusts, limitations and conditions as are prescribed for them in

my said Will; but subject nevertheless to the following additional provisions, limitations and remainders, to-wit: The interest as aforesaid of each of said children shall enure to and be enjoyed by each for and during the period of his or her natural life respectively; and if either of said children of my daughter Augusta shall die leaving no child or children in life, the interest of said child so dying shall [fol. 45] enure to and be injoyed by the surviving child or children of my daughter Augusta in the estates and with the same remainders as are herein prescribed for the original interest so received by each of them respectively. In making provisions for the children of my daughter Augusta I am not unmindful of the fact that part of the property thus generally devised is held by me in trust for my wife and children; but as the property thus held by me in trust is less than one-half of the aggregate of the property held by me both in trust and in my own right, the division herein directed thus generally, can be made without violation the terms of said trust. To prevent possibility of misconstruction I hereby prescribe and declare that all interest of the said children of my said daughter Augusta in the property specified in Item 9 of my said Will and in the rents, issues and profits thereof, shall cease, end and determine upon the death of my wife Virginia Lamar Bacon and of my daughter Mary Louise Bacon Sparks.

Item 4th

I direct that the said Custis Nottingham shall with his family continue to occupy free of rent the house now occupied by him at Baconsfield until the full experation and execution of the trusts for the preservation and execution of which I have in my said Will and in this Codicil appointed the said Alexander Lawton Miller, Custis Nottingham, R. C. Jordan and Minter Wimberly as Trustees as aforesaid; this provision being made in consideration of the personal interest in and care for said trust property and said cestui que trusts by said Nottingham.

[fol. 46] Item 5th

Except as herein modified and changed by this first Codicil, I do again hereby make, declare and publish my said last Will and Testament heretofore made, declared and published by me on the 28th day of March, 1911.

In witness whereof I, the said Augustus Octavius Bacon, at Washington in the District of Columbia on this the sixth day of September (1913) Nineteen hundred and thirteen to the foregoing four and one half pages written with my own hand and containing this first Codicil to my said last Will and Testament, do hereunto set my hand and affix my seal in the presence of the attesting witnesses hereunto subscribing as such at my request.

/s/ Augustus Octavius Bacon (Seal)

Signed, sealed, declared and published by Augustus Octavius Bacon as the first Codicil to his last Will and Testament in the presence of the undersigned, who each of us, at his request, have subscribed our names as witnesses thereto in the presence of the said Testator and in the presence of each other, this the Sixth day of September (1913) Nineteen hundred and thirteen.

/s/ Jno. T. Boifeuillet

/s/ James L. Fort

/s/ Earl B. Williams

[File endorsement omitted]

[fol. 47]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

ANSWER OF DEFENDANT, CITY OF MACON—
Filed May 20, 1963

Comes now the City of Macon, one of the defendants named in this action and files this answer to plaintiffs' petition, and shows:

1.

This defendant admits paragraphs one and two of plaintiff's petition.

2.

This defendant denies paragraph three of the petition, as pleaded, but admits that the defendant is a municipality duly created by the Legislature of the State of Georgia and that this defendant holds the legal and equitable title to the property in question, subject to the provisions of Item 1X of the last will and testament of Augustus Octavius Bacon.

3.

On information and belief, this defendant admits paragraph four of the petition.

4.

This defendant admits paragraphs five, six and seven of the petition.

5.

This defendant denies paragraph eight of the petition as pleaded. The said will attached to the petition speaks for

itself and is subject to interpretation and construction by this court.

[fol. 48]

6.

This defendant can neither admit nor deny paragraph nine of the petition, but, on information and belief, admits that subject property has been used exclusively by white persons.

7.

This defendant denies paragraph ten as pleaded. However, this defendant admits that large numbers of Negro citizens have gone upon the subject property and used the same for various recreational activities during the past few weeks, and the City of Macon further admits that the use of the subject property by said members of the Negro race is not in conformity with the expressed intentions of said testator as contained in Item 1X of the aforesaid will. Further, the City of Macon alleges that it has no authority to enforce racially discriminatory restrictions with regard to property held in fee simple or as trustee for a private or public trust and, as a matter of law, is prohibited from enforcing such racially discriminatory restrictions.

8.

This defendant admits the first sentence of paragraph eleven, but denies the remaining portion of said paragraph as pleaded.

9.

Defendant denies paragraph twelve of plaintiffs' petition.

10.

This defendant neither admits nor denies paragraph thirteen of plaintiffs' petition since no answer is required.

[fol. 49] For further plea and answer this defendant shows:

11.

The City of Macon cannot legally enforce racial segregation of the property known as Baconsfield and, therefore, is unable to comply with the specific intention of the said testator with regard to maintaining the property for the exclusive use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon; neither can the City convey said property to private individuals, either for or without consideration, in order to carry out the said specific intention of the said testator.

WHEREFORE:

This defendant prays that this honorable court construe the last will and testament of the late Augustus Octavius Bacon and enter a decree setting forth the duties and obligations of the City of Macon in the premises and give such directions as the court deems proper, just and equitable.

Buckner F. Melton, 305 Persons Building, Macon, Georgia, Attorney for Defendant, City of Macon.

Duly sworn to by Edgar H. Wilson, jurat omitted in printing.

[fol. 50] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 51]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

ANSWER OF DEFENDANTS GUYTON G. ABNEY, J. D. CRUMP, T. I. DENMARK, AND DR. W. G. LEE, AS SUCCESSOR TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF AUGUSTUS OCTAVIUS BACON, DECEASED—Filed May 27, 1963

Come now Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased,

named among others as defendants in the above captioned matter, and answering said petition, respectfully show:

1.

These respondents admit the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of said petition.

2.

Further answering said petition, these respondents, without waiving any of the rights, title or interest vested in them under said Last Will and Testament, join in each and every prayer of said petition and, without limiting the generality of the foregoing, pray that the City of Macon be removed as trustee of the charitable trust created in said Last Will and Testament and Codicil of Augustus Octavius Bacon, deceased.

Jones, Sparks, Benton & Cork, Attorneys for respondents Guyton G. Abney, J. D. Crump, T. I. Den-
[fol. 52] mark and Dr. W. G. Lee, As successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased.

Duly sworn to by Guyton G. Abney, jurat omitted in printing.

[fol. 53] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 54]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

MOTION FOR SUMMARY JUDGMENT—Filed May 27, 1963

Come now C. E. Newton, Frank M. Willingham, Mrs. Francis K. Hall, Mrs. Kenneth W. Dunwody, Mr. George P. Ranking, Jr., Mrs. Frederick W. Williams and Mrs. T. J.

Stewart, petitioners in the foregoing matter and make this motion for a summary judgment, and respectfully show:

1.

There is no genuine issue as to any material fact and your petitioners are entitled to a judgment as a matter of law.

Wherefore, your petitioners pray that this their motion for summary judgment be granted and that they have such other and further relief as the Court may deem fit and proper.

Jones, Sparks, Benton & Cork, Attorneys for petitioners.

Certificate of service (omitted in printing).

[fol. 55] [File endorsement omitted]

[fol. 56]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

MOTION OF REV. E. S. EVANS, ET AL. TO INTERVENE—
Filed May 29, 1963

Come now, Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, and move this Honorable Court for leave to file a petition of intervention in the above-styled action, and for grounds show as follows:

1.

That the property which is the subject matter of the captioned action is presently used as a public park in the City of Macon.

2.

The movants, being Negro residents of the City of Macon, and all other Negroes similarly situated, are subject to being irreparably harmed and damaged, in that, they are subject to being deprived of the use of said park if the prayers of the plaintiffs are sustained and a judgment is rendered in their favor.

3.

That the interests and welfare of the movants will be directly affected by the outcome of said suit, but there are no parties to the subject action who are or can adequately protect the legal rights and interests of the movants or the class which they represent, in that, some of the interests of the defendants and the movants are not only different but are, to some extent, adverse.

[fol. 57] 4.

Wherefore, movants pray that:

(a) This motion be allowed;

(b) That movants be granted leave to file their intervenors' petition in the above-captioned action;

(c) That all of the proceedings in the instant case be held in abeyance pending the filing of the intervenors' pleadings:

(d) That movants be granted thirty (30) days in which to file their pleadings in the captioned action.

This 26th day of May, 1963.

Donald L. Hollowell, Counsel for Movants.

859½ Hunter St., N. W., Atlanta 14, Georgia, Ja. 5-8372.

[fol. 58]

ORDER—May 28, 1963

Motion read and considered, let the same be filed.

It Is Hereby Ordered that the movants be, and they are granted leave to file their pleadings of intervention in the subject action within (20) Twenty days from the date of this order. All other proceedings in this action are hereby continued pending the filing of said pleadings within the time specified.

This 28 day of May, 1963.

O. L. Long, Judge, Bibb Superior Court.

[File endorsement omitted]

[fol. 59]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

INTERVENORS' PETITION—Filed June 18, 1963

Comes now, Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, who file this their intervention to the claim for relief of the plaintiffs, in their individual capacities and as they constitute the Board of Managers of Baconsfield, and show as follows:

1.

That the intervenors are Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, and are citizens of the United States of America and of the State of Georgia. Intervenors are domiciliaries and residents of Bibb County, Georgia, and of the City of Macon, Georgia. Each of the

intervenors is a member of the Negro race and bring this petition of intervention on behalf of themselves and other Negroes similarly situated as a class.

2.

That the present parties defendant, as named and designated in the petition, cannot adequately represent and assert the interest of the intervenors. For the intervenors seek to have Baconsfield Park operated upon an integrated basis and the present parties defendant have an interest in continuing to operate the said park upon a desegregated [fol. 60] basis according to Item 9 of the Will of Augustus Octavius Bacon which is attached to the plaintiffs' petition, marked "Exhibit 2", and thereby incorporated herein by reference.

3.

That any judgment, final order, or decree entered in the captioned action would be binding upon the intervenors and thus prejudicial to them.

4.

That by the Will of Augustus Octavius Bacon, the real property described in Item 9 became vested in the City of Macon in fee simple absolute upon the death of the testator and certain of his devisees and legatees under his will and codicil.

5.

That the Board of Managers charged by the Will with the obligation to control, maintain, and regulate Baconsfield Park is an agency of the City of Macon. Said Board of Managers having become such by the City of Macon having appointed and having designated its members from the date of creation of the park, until the present time, and by the City of Macon having adopted the Acts and Resolutions of said Board and by having acquiesced in the same.

6.

That the restriction and limitation reserving the use and enjoyment of the devise, legacy, and bequest of Baconsfield Park to the City of Macon to "White women, white girls, white boys and white children of the City of Macon," is violative of the public policy of the United States of America, treaties and other international obligations of the [fol. 61] United States and violative of the Constitution and laws of the State of Georgia. The public policy of the United States and of the State of Georgia being that no citizen is to be deprived of the use, benefit, and enjoyment of any publicly owned or supported facility solely because of his race, national origin, creed, or religion.

7.

That this Honorable Court, as an agency of the State of Georgia, cannot consistently with the equal protection clauses of the Fourteenth Amendment of the United States Constitution and the equivalent provisions of the Constitution of the State of Georgia, enter an order, as a court of equity, appointing three (3) freeholders, residents of the City of Macon, to serve as successor trustees, who in such capacity as trustees could operate and maintain Baconsfield Park upon a segregated basis; that is, the use and enjoyment of the same being limited and restricted to "white women, white girls, white boys and white children of the City of Macon." Such an order appointing private citizens as trustees for the manifest and express purpose of operating, managing, and regulating public property which passed to the City of Macon under a charitable trust created by will in a racially discriminatory manner, is violative of the Fourteenth Amendment to the United States Constitution and of the equivalent provisions of the Constitution of the State of Georgia.

[fol. 62] For a Second Answer and Defense

8.

That at the time the said will was probated and the real property known as Baconsfield Park passed to the City of Macon, the law of the land and of the State of Georgia as expressed and stated in the case of *Plessy* v. *Ferguson,* 163 U. S. 537, and decisions of the courts of this state and the laws of the State of Georgia consistent therewith permitted a racially restrictive condition and limitation imposed upon a public charitable trust to be enforced by the courts of the state wherein the trust was located. Since that time, the law of the land as reflected in the cases of *Brown* v. *Board of Education,* 347 U. S. 483, and the *Memphis Park Case* (decided in the United States Supreme Court May 27, 1963), and in decisions and judgments of the courts of this State and the laws consistent therewith, has changed. That is, discrimination based solely upon race is no longer a permissible object of state action whether such action is that of an administrative agency, the state executive officers and employees, the state legislature, or of the state courts.

9.

That, although the charitable legacy, device, and bequest at the time of its creation was capable of being executed in the exact manner provided for in the will of the testator, by operation of law it is no longer capable of further execution in the exact manner provided for by the testator, Augustus Octavius Bacon. That this Court (sitting in equity) effectuate the general charitable purpose of the testator to establish and endow a public park within the [fol. 63] City of Macon by refusing to appoint private persons as trustees of the said Baconsfield Park.

10.

That the plaintiffs as they appear by name and designation in the petition, are not proper parties to maintain a petition for the removal and appointment of trustees of a

public charitable trust as it does not appear that they have the requisite authority as required by law nor the requisite capacity and standing as required by law.

11.

That the plaintiffs, the named individuals and the Board of Managers do not come into this Court with clean hands. The plaintiffs seek judicial sanction of their alleged and avowed intent, design, and purpose to have private persons appointed in their place and stead as trustees, managers of Baconsfield Park, so that the said Baconsfield Park may be operated in violation and degradation of the constitutional rights of the intervenors.

Wherefore, the intervenors respectfully pray that they may have judgment against the petitioners with costs upon the petitioners.

Donald L. Hollowell, Horace T. Ward, Counsel for Intervenors.

Howard Moore, Jr., Of Counsel.

[fol. 64] June 14, 1963.

Certificates of service (omitted in printing).

[File endorsement omitted]

[fol. 65]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO PLAINTIFFS' PETITION—
Filed January 8, 1964

Come now the plaintiffs in the above styled case and by leave of the Court first had and obtained, amend their petition as follows:

1.

By adding thereto a paragraph "14" to read as follows: "since the time when the original petition was filed, an intervention has been filed on behalf of certain negro residents of Macon, Bibb County, Georgia, to-wit: Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone. That intervention was filed on behalf of the above named parties and on behalf of 'other Negroes similarly situated' as a class".

2.

By adding thereto paragraph "15" to read as follows; "Plaintiffs show that by the phrase 'other Negroes similarly situated' the intervenors encompass all Negro residents of Macon, Bibb County, Georgia. Plaintiffs show that each and every one of the intervenors named in the above paragraph plus each and every member of the Negro race resident in Macon, Bibb County, Georgia, as the class represented should be permanently enjoined from entering the grounds of Baconsfield, using any of the facilities located thereon or in any other way interfering with plaintiffs in [fol. 66] their efforts to carry out the express testamentary wishes of A. O. Bacon relating to the classes of persons to be benefited by his grant of Baconsfield."

3.

By adding thereto a paragraph "16" to read as follows: "Plaintiffs show that a trust was established under the Will of A. O. Bacon for his heirs. The trust has been executed as regards four of his seven heirs now living and a distribution of property made to them. They are A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks. The interests of the remaining three heirs, i.e. Louise Curry Williams, Shirley Curry Cheatham, and Manley Lamar Curry, are still held under an unexecuted trust by four trustees holding under the authority of the will, to-wit: Guyton Abney, J. D. Crump, T. I. Den-

mark and Dr. W. G. Lee. Plaintiff shows that these seven persons have a definite interest in the disposition of this litigation, since if the trust purpose expressed in the Will of A. O. Bacon with respect to the designation of persons who may use Baconsfield, fails, the property comprising Baconsfield together with property, the rentals of which provide the upkeep of Baconsfield, will revert and lapse into the estate of A. O. Bacon thence to be distributed to the above named heirs."

4.

By adding thereto a paragraph "17" to read as follows: "Plaintiffs show that there are no parties to this case with an interest identical to that of the Sparks heirs of A. O. Bacon such as to afford adequate representation to [fol. 67] the interests of the said heirs."

5.

By adding thereto a prayer to read as follows: "Plaintiffs pray that A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks be allowed to intervene and that Guyton Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee be allowed as Trustees to assert the interest of Louise Curry Williams, Shirley Curry Cheatham and Manley Lamar Curry."

6.

By adding thereto a prayer to read as follows: "Plaintiffs pray that each and every one of the intervenors named in paragraph one, plus each and every member of the Negro race resident in Macon, Bibb County, Georgia, as the class represented be permanently enjoined from entering the grounds of Baconsfield, using any of the facilities located thereon, or in any other way interfering with plaintiffs in their efforts to carry out the express testamentary wishes of A. O. Bacon relating to the classes of persons to be benefited by his grant of Baconsfield."

Wherefore, plaintiffs pray that their amendment be allowed.

Jones, Sparks, Benton & Cork, Attorneys for Plaintiffs.

ORDER—January 8, 1964

The within amendment being presented to me, it is allowed and ordered filed, subject to demurrer.
This the 8 day of January, 1964.

O. L. Long, J.S.C.M.C.

[fol. 68] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 69]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

PETITION FOR INTERVENTION—Filed January 8, 1964

The petition of A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks, respectfully shows to the court the following facts:

1.

Petitioners herein are grandchildren of the heirs of A. O. Bacon, deceased, being children of his deceased daughter, Mary Louise Bacon Sparks. The widow and only other child of the said A. O. Bacon who survived him are now deceased.

2.

Petitioners have an interest in the subject matter of the above styled case, since if the trust purpose expressed in

the Will of A. O. Bacon, including the restriction of the use of Baconsfield Park to white persons, is not carried out, the property will lapse into the Estate of A. O. Bacon, ultimately to be distributed to his heirs.

3.

Petitioners show that there is no party presently before the Court to represent their said interest.

4.

Petitioners present the following requests for relief praying that:

(a) They be allowed to intervene and be heard.

(b) That all of the prayers of plaintiffs, the Board of Managers of Baconsfield, be granted.

[fol. 70] (c) That each and all of the Negro intervenors and all of those whom they represent be permanently enjoined from entering Baconsfield Park or from in any way interfering with the Board's management of the Park for the use and benefit of white persons only.

5.

Further, petitioners emphasize beyond all chance for doubt that their desire is that the above enumerated prayers be granted, that the City of Macon be replaced as Trustee and that such other and further relief be granted by this Court as will insure that Baconsfield Park will continue to be operated in strict accordance with the Will of A. O. Bacon. It is the most fervent hope of intervenors that Baconsfield will remain as a memorial to the memory of the infant sons of A. O. Bacon and as a park for the benefit of the white boys, white girls and white women of Macon, Georgia, under the direction of the plaintiff Board of Managers.

6.

Petitioners further pray that if this Court does not enter an order in this case effectuating the continued administration of Baconsfield in accordance with the Will of A. O. Bacon for the sole benefit of white persons, That in that event,—And Only In That Event—this honorable Court decree that the trust purpose having failed, the property included in Baconsfield and that property, the rental of which had supplied the income for the upkeep of Baconsfield, both be held to revert and lapse into the estate by operation of law.

Jones, Sparks, Benton & Cork, Attorneys for Petitioners.

[fol. 71]

ORDER—January 8, 1964

The within petition for intervention being presented to me, it is allowed and ordered filed, subject to demurrer.

This the 8 day of January, 1964.

O. L. Long, J. S. C. M. C.

Certificate and acknowledgment of service (omitted in printing).

[File endorsement omitted]

[fol. 72]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO ANSWER AND CROSS BILL—
Filed January 8, 1964

Come now Guyton Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee, defendants in the above styled case, and

by leave of the Court first had and obtained amend their answer as follows:

1.

By adding a paragraph 3 to read as follows: "These defendants are Trustees under the Will of A. O. Bacon for the benefit of certain of his heirs, to-wit: Louise Curry Williams, Shirley Curry Cheatham and Manley Lamar Curry. A similar trust has become executed with respect to certain other heirs, to-wit: A. O. B. Sparks, W. B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks, but the trust with respect to the first named group of heirs, which shall hereinafter be referred to as the 'Curry Heirs', has not become executed."

2.

By adding a paragraph 4 to read as follows: "defendants show that the Curry Heirs have an interest in the subject matter of the above styled case, since if the trust purpose expressed in the Will of A. O. Bacon, including the restriction of the use of Baconsfield to white persons, is not carried out, the property will lapse into the Estate of A. O. Bacon, ultimately to be distributed to his heirs."

[fol. 73] 3.

By adding by way of a cross bill the following prayer: "Defendants as such Trustees and on behalf of the said Curry heirs present the following requests for relief praying:

(a) That they be allowed to assert the interest of the Curry heirs.

(b) That all of the prayers of plaintiffs, the Board of Managers of Baconsfield, be granted.

(c) That each and all of the Negro intervenors and all of those whom they represent be permanently enjoined from entering Baconsfield or from in any way inter-

fering with the Board's management of Baconsfield for the use and benefit of white persons only."

4.

By adding a paragraph to read as follows: "Further, defendants as such Trustees and on behalf of the Curry heirs emphasize beyond all chance for doubt that the desire of the Curry heirs is that the above enumerated prayers be granted, that the City of Macon be replaced as Trustee and that such other and further relief be granted by this Court as will insure that Baconsfield will continue to be operated in strict accordance with the Will of A. O. Bacon. It is the most fervent hope of the Curry heirs that Baconsfield will remain as a memorial to the memory of the infant sons of A. O. Bacon and as a park for the benefit of the white boys, white girls and white women of Macon, Georgia, under the direction of the plaintiff Board of Managers."

[fol. 74] 5.

By adding by way of cross bill the following prayer: "Defendants as such Trustees and on behalf of the Curry heirs further pray that if this Court does not enter an order in this case effectuating the continued administration of Baconsfield in accordance with the Will of A. O. Bacon for the sole benefit of white persons, that in that event,—And Only In That Event—this honorable Court decree that the trust purpose having failed, the property included in Baconsfield and that property, the rental of which had supplied the income for the upkeep of Baconsfield, both be held to revert and lapse into the estate by operation of law."

Jones, Sparks, Benton & Cork, Attorneys for the aforementioned Trustees.

ORDER—January 8, 1964

The within Amendment to Answer and Cross Bill being presented to me, it is allowed and ordered filed, subject to demurrer.

This the 8 day of January, 1964.

O. L. Long, J.S.C.M.C.

[fol. 75] Certificate and acknowledgment of service (omitted in printing).

[File endorsement omitted]

[fol. 76]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO ANSWER OF CITY OF MACON—
Filed February 5, 1964

Comes now the City of Macon, defendant in the above stated case, and by leave of the Court first had and obtained amends its answer heretofore filed and respectfully shows:

1.

Pursuant to a resolution adopted by the Mayor and Council of the City of Macon at its regular meeting on February 4, 1964, a copy of which is hereto attached marked Exhibit A, the City of Macon acting through its Mayor and Clerk has resigned as Trustee under Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon, a copy of said resignation being hereto attached marked Exhibit B.

2.

Upon the acceptance of said resignation by this Court and the appointment of new Trustees to serve in lieu of the City of Macon, if this Court sees fit to appoint such new Trustees, the City of Macon will have no further duties to perform as such Trustee and will no longer be a necessary or proper party in said case.

Wherefore, defendant prays:

(1) That this amendment be allowed and ordered filed as part of the record in said case;

[fol. 77] (2) That the resignation of the City of Macon as Trustee under the Will of Senator Augustus Octavius Bacon be accepted, and that the Court take such further action in the premises as to the Court may seem meet and proper;

(3) That defendant be hence discharged.

Trammell F. Shi, City Attorney.

ORDER

The foregoing amendment allowed and ordered filed.

This February 5, 1964.

O. L. Long, J.S.C.M.C.

Certificates of service (omitted in printing).

[fol. 79]

EXHIBIT "A" TO AMENDMENT TO ANSWER

RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF MACON ADOPTED FEBRUARY 4, 1964

WHEREAS, in Civil Action No. 25864, pending in the Superior Court of Bibb County, Georgia, captioned *Charles E. Newton, et al.* vs. *City of Macon, et al.* the defendant City of Macon has heretofore filed its answer admitting that it has not for some time prior to filing said answer carried out as Trustee all of the provisions of the trust established in Items 9th and 10th of the Last Will and Testament of the Late Senator Augustus Octavius Bacon with reference to the property known as Baconsfield, said Items 9th and 10th reading as follows:

"Item 9th

"I direct that there by said Trustees laid off and accurately defined and permanently marked by enduring

monuments, the following described part of my farm which is situated in part within and part without the corporate limits of the City of Macon, and known as 'Baconsfield,' the same to be set a part and dedicated to the purposes, uses and enjoyments as hereinafter more fully set forth and detailed. The said part of the property thus set apart is bounded as follows: There is on the Southeastern part of my said farm a four acre rectangular tract which formerly belonged to James Pepper, and which is commonly known as the 'Pepper Place' the same having been purchased and added to my farm, for this description, beginning at [fol. 80] the Southeastern corner of said rectangular tract, the boundary line of the property runs in a Northerly direction along the Eastern boundary line of said Pepper Place and thereafter in a direct prolongation of the same to a point nine hundred and sixty-three feet and five-tenths from the said starting point, thence in a slightly northwestern direction sixty-three feet and five-tenths, thence in a northerly direction three hundred and thirty-two feet across boulevard Baconfield to a point on the Western side of said Boulevard, thence three hundred and sixteen feet along the western border of said Boulevard to a point on the same immediately opposite the junction of said Boulevard and Gray Street, thence, in a direction a little West of North, twenty-four hundred and eighty feet to an elm tree, thence at right angles sixteen hundred and sixty-two feet to the bank of the Ocmulgee River, thence in a Southeasterly direction along the bank of said river thirty-three hundred and ninety-seven feet, thence in a direct line to the Southwest corner of the said Pepper lot, thence four hundred and thirty-seven feet along the Southern boundary line of said Pepper lot to the original starting point; the said metes and bounds of the said tract of land being correctly platted and defined on a map of the same hereto attached, made by H. D. Cutter and upon which for the purpose of identification, I have endorsed my original signa-

[fol. 81] ture. The larger part of the property thus described and bounded is a portion of a trust estate originating with me and created solely by me for the benefit of my wife and children during my life and for their benefit and use after my death in such estates and with such remainders as should be specified and directed by me in my last Will and Testament. For the purpose of carrying out fully the purpose and intent of the trust thus created, I hereby give, bequeath and devise the said property consisting of the tract of land hereinbefore described and bounded and platted on said map unto the said Trustees, viz. Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, in trust for the sole joint use, benefit and enjoyment of my wife, Virginia Lamar Bacon, and of my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, during the term of their natural lives, as follows: So long as they shall all live they shall be entitled to the equal enjoyment and use of the same including all revenues and profits in any way derived therefrom. When Mrs. Virginia Lamar Bacon shall die, the use, benefit and enjoyment of the entire property herein described and bounded shall belong to my two said daughters equally, including all revenues and profits in any way derived from the same, during the full term of their natural lives. Upon the death of either of my said daughters, [fol. 82] her interest in said property shall be enjoyed by her children and the survivors of them until the death of my last surviving daughter. Upon the death of my said wife and of each of my said daughters, and of the last survivors of them, the trust created in this property by this said Ninth Item of this Will in the said tract of land thus defined, bounded and platted shall crase, and thereafter shall close all interest and right of enjoyment of any person or persons whomsoever in said property except as hereinafter specified and provided, to-wit: When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon

Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers [fol. 83] hereinafter provided for; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. for the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as at first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all

needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person [fol. 84] or persons of either sex, who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsisting with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the poser to admit to the use of the property the white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield, beginning at the north Macon bridge and including the 'Pepper Place,' also all of said property lying on the river which is property classed as low lands, or river bottom; but in no event and under no circumstances shall any part of the property herein conveyed and bounded and [fol. 85] platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified. If it should be held that said property is subject to

taxation when devoted to such uses as a park or pleasure ground, I request that proper steps be taken to secure from the State of Georgia a perpetual release from all liability to taxation.

"I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

"I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common. I am moved to make this bequest of said property for the use, benefits and enjoyment of the white persons herein specified, by my gratitude to [fol. 86] and love of the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December 1884 and Augustus Octavius Bacon, Jr. who died on the 27th day of the same year. And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated. I direct that said property during the lives of my said wife and my two said daughters shall continue to be known and designated as 'Baconsfield' and that after their death, it shall be forever and perpetually known as 'Baconsfield,' and shall be so designated in all matters, documents and papers relating thereto.

"While I make no restrictions, I request that the Managers will preserve on the property my present house residence, and the smaller house nearby which I

have personally occupied for so many years and which I have called 'The Hut' the said houses to be used to the best advantage, and in such localities on the property as may be most desirable, for the comfort, convenience and pleasure of the white women, girls, boys and children herein designated: and I trust that the [fol. 87] managers of said property may find it to the best interest of those who are to enjoy this property that there shall be perpetually preserved the present woods and trees upon the same. And I specifically direct that during the said trust estate in said property for the uses and benefit of my wife Virginia Lamar Bacon and of my two daughters Mary Louise Bacon Sparks, and Augusta Lamar Bacon Curry, neither the said residence house nor the said smaller house known as 'The Hut' shall be removed or destroyed or materially altered by addition or otherwise, but that the same during the entire terms of said trust estate for life, be carefully preserved in their present condition; and further that during the terms of said trust estates and during the lives of my said wife and my two said daughters, the woods and trees on said property be carefully preserved, and that on one of them be cut down or destroyed for any purpose whatsoever; and I further specifically provide and direct that the said trustees hereinbefore named and their successors shall not have power or authority to sell or otherwise alienate or dispose of the tract of land thus described, bounded and platted or any part thereof during the continuance of said trust or trusts or at any other time, under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby hereby expressly denied to them, and to all others."

[fol. 88] "Item 10th

"To make still further provision for the preservation, management and improvement of the property set apart in the foregoing 9th Item of this Will as a park and pleasure grounds as aforesaid, I will and be-

queath to the Mayor and Council of the City of Macon, and to their successors, ten bonds of the Macon Railway and Light Co., each of said ten bonds being for $1000.00 and in the aggregate being for $10,000.00 and bearing interest at the rate of five per centum per annum, and at present in the custody of the The Riggs National Bank in Washington, D. C., the said bonds and all monies or things of value resulting and derived therefrom to be held by the said Mayor and Council of the City of Macon and their successors for the following trusts and uses, to-wit: So long as the property known and to be known perpetually as 'Baconsfield,' specified, bounded and described in the foregoing 9th Item of this Will, shall continue to be held in trust by the Trustees named in the said foregoing 9th Item and their successors for the use and beiefit of my said wife and my two said daughters, or either of them, until the said property shall vest in the Mayor and Council of the City of Macon to be held in trust for the purposes specified and for the uses directed in the said 9th Item. The said Mayor and Council of the City of Macon shall as said Trustees collect the semi- [fol. 89] annual interest which shall be paid on said bonds, and as promptly as practicable invest the same in interest bearing bonds to be added to and included in said trust fund; and the interest received on the additional bonds thus purchased, and from all other bonds additional thereto resulting from and accruing to said fund, shall in like manner be reinvesting in interest bearing bonds, so that all income from said fund or in any manner accuring to said fund shall as far as practicable be semi-annually compounded and added to the principal of the original fund. When the said 9th Item and their cussessors shall cease to hold said property in trust for my said wife and my said daughters, as provided in the said 9th Item, and when as therein provided, the Mayor and Council of the City of Macon shall as Trustees be vested with said property and the title to the same for the uses therein set

forth, they shall as may be required for the preservation, maintenance and improvement of said park and pleasure ground, pay over to the Board of Managers hereinbefore provided for, the income subsequently received from said trust fund constituted of and resulting from the said bonds; and all income derived from said property, and from said bonds, and the proceeds thereof, when not required for the needs of said park and pleasure ground, be added to the said principal fund, to the end that from increased income it may be in greater and ever increasing degree beauti- [fol. 90] ful and developed and equipped for the benefit and enjoyment of those for whose pleasure and happiness it is designated. If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation. Should the Mayor and Council of the City of Macon at any time consent to do so, then I direct that they be authorized to receive the fund constituted of said bonds and all additions thereto and the proceeds thereof, and cover the same into the treasury of the City, in consideration of the perpetual obligation of the City to be evidenced by its bond or otherwise, to provide and pay over annually to the said Board of Managers an amount equal to five per centum interest [fol. 91] upon the sum thus covered into the treasury,

to be devoted by said Board to the uses hereinbefore specified. In making this bequest as expressed in this and the preceding item of my Will, I have been mindful to preserve the full use and enjoyment of the real estate to my wife and daughters during their natural lives, and also of the fact that the entire bequest in value represents a very much smaller proportion of my estate than would have been the share in it of my two sons had they lived. As there will be no one of my descendants who now bears my name by right of birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community of which they once formed a happy part."

and,

WHEREAS, under certain decisions of the Federal courts the City of Macon has realized that it could not as a numicipal corporation carry out all of said provisions; and

WHEREAS, the Mayor and Council deem it to be in the public interest that Baconsfield be operated and maintained for the benefit of the public rather than for private benefit or profit; and

WHEREAS, the Mayor and Council are greatly concerned [fol. 92] that if Baconsfield is not operated and maintained in accordance with all of the provisions of the Will of Senator Bacon, the property may revert to private persons who are heirs at law of or legatees under the Will of Senator Bacon, in which case Baconsfield would become commercial or residential property or property of a nature wherein no part of the public would have the enjoyment of the property contemplated by Senator Bacon; and

WHEREAS, the City is advised that the income producing property which the late Senator Bacon bequeathed in trust for the purpose of maintaining Baconsfield is sufficient for

that purpose and that if the Court decides to appoint new Trustees the park may be economically maintained by the Trustees in accordance with the expressed intentions of the late Senator Bacon, and at no cost to the City in connection with such operations and maintenance; and

WHEREAS, it is the considered opinion of the Mayor and Council that it is against good conscience for the City of Macon to continue to serve as Trustee under said Will under circumstances where as such Trustee it cannot carry out the plain and unambiguous terms of the trust; and

WHEREAS, in the light of the foregoing it is the considered opinion of the Mayor and Council that the City of Macon should forthwith resign as Trustee under the Will of Senator Bacon;

NOW, THEREFORE, be it resolved by the Mayor and Council of the City of Macon, and it is hereby resolved, that the City of Macon forthwith resign as Trustee under the trust established in Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon.

[fol. 93] RESOLVED FURTHER, that the Mayor and the Clerk of Council be authorized to sign in the name of the City of Macon a written resignation of such trust and deliver the same to Mr. Trammell F. Shi, City Attorney, with instructions to him to deliver it to the Superior Court of Bibb County, Georgia, in the litigation now pending instituted by the Board of Managers of Baconsfield, created in said Will, against the City of Macon and others.

[fol. 94]

EXHIBIT "B" TO AMENDMENT TO ANSWER

RESIGNATION OF THE CITY OF MACON AS TRUSTEE UNDER WILL OF SENATOR AUGUSTUS OCTAVIUS BACON

Pursuant to a resolution adopted on the 4th day of of February, 1964, by Mayor and City Council of the City of Macon, the City of Macon hereby resigns as Trustee of the property known as Baconsfield under the trust estab-

lished in Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon.

IN WITNESS WHEREOF, as directed in the aforesaid resolution, the City of Macon has caused these presents to be executed by the Mayor and the Clerk of Council and its seal affixed, this the 4th day of February, 1964.

THE CITY OF MACON

By B. F. Merritt, Jr.
Mayor of the City of Macon

Attest: Alex B. Cameron
Clerk of Council
City of Macon

(Seal of the City of Macon)

[File endorsement omitted]

[fol. 95]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO INTERVENORS' PETITION—
Filed March 5, 1964

Comes now, the intervenors in the above-styled case, Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, and by leave of Court first had and obtained, amend their petition by adding thereto four additional paragraphs to be known as paragraphs 12, 13, 14, and 15, and a prayer, as follows:

12.

That the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits this Court from enjoining Negroes from use of the park.

13.

That the equal protection clause of the Fourteenth Amendment prohibits this Court from accepting the resignation of the City of Macon as trustee and appointing new trustees for the purpose of enjoining the racially discriminatory provision in the will of A. O. Bacon.

14.

That Georgia Code Annotated, Section 69-504 prescribes racial discrimination and is therefore violative of the equal [fol. 96] protection clause to the Fourteenth Amendment. Since the racially discriminatory provision in A. O. Bacon's will was dictated by that unconstitutional statute, enforcement of the racially discriminatory provision is constitutionally prohibited.

15.

Georgia Code Annotated, Section 108-202, properly construed, requires that the racially discriminatory provision in A. O. Bacon's will be declared null and void.

Wherefore, the intervenors respectfully pray that this Court withhold approval of the attempted resignation of the City of Macon as trustee under the will of A. O. Bacon, direct the City of Macon to continue to fulfill this paramount constitutional obligation to administer the park on a racially non-discriminatory basis, and deny the injunction sought by plaintiffs to exclude Negroes from use of the park.

Wherefore, the intervenors pray that this amendment be allowed.

Donald L. Hollowell, 859½ Hunter St., N. W., Atlanta, Georgia 30314, Attorney For Intervenors.

William H. Alexander, Of Counsel For Intervenors.

[fol. 97]

ORDER—March 5, 1964

The foregoing amendment read and considered,

It Is Ordered that the same be filed, subject to objections.

This 5 day of March, 1964.

O. L. Long, Judge, Superior Court, Macon Judicial Circuit.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 99]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

CHARLES E. NEWTON, ET AL.,

v.

CITY OF MACON, ET AL.

ORDER AND DECREE—March 10, 1964

The Motion for Summary Judgment filed in behalf of petitioners in the above captioned matter having come on regularly to be heard, and the Court having duly considered all pleadings filed in behalf of all parties to said cause and the briefs filed in behalf of petitioners and the intervenors Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, it is

Considered, Ordered and Adjudged as follows:

(1) The intervenors named above are proper parties to this case and are proper representatives of the class

which their intervention states they represent, to-wit, the negro citizens of Bibb County, Georgia, and the City of Macon, Georgia.

(2) The defendants Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, are also proper parties to the case, as are the intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks.

(3) The defendant the City of Macon having submitted its resignation as Trustee of the property described in the petition and known as Baconsfield, said resignation is here-[fol. 100] by accepted by the Court.

(4) Under the principle that a trust shall not fail for want of a trustee it becomes the duty of this Court to appoint new trustees to serve in lieu of the City of Macon; and the following, all being citizens and residents of Bibb County, Georgia, are hereby appointed as Trustees, to-wit, Hugh M. Comer, Lawton Miller and B. L. Register.

(5) The Court hereby retains jurisdiction for the purpose of appointing another trustee or trustees in the event any of the persons named above fails to accept his appointment or in the event of the future death, incompetency or other cause whereby any or all of such Trustees fail or cease to act as such.

(6) Since the relief herein granted is also that primarily sought by the defendants Guyton G. Abney, et al., as Trustees under the Last Will and Testament of Augustus Octavius Bacon and by intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks, it is therefore unnecessary to pass upon and the Court does not pass upon the secondary contentions outlined in paragraph 5 of the amendment to the answer and cross bill filed by Guyton G. Abney, et al., as Trustees and in paragraph 6 of the petition for intervention filed by the above named intervening heirs.

So Ordered, this the 10 day of March, 1964.

O. L. Long, J.S.C.M.C.

[File endorsement omitted]

[fol. 101]

ATTACHMENT TO ORDER

RESIGNATION OF THE CITY OF MACON AS TRUSTEE UNDER WILL OF SENATOR AUGUSTUS OCTAVIUS BACON

Pursuant to a resolution adopted on the 4th day of February, 1964, by Mayor and City Council of the City of Macon, the City of Macon hereby resigns as Trustee of the property known as Baconsfield under the trust established in Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon.

IN WITNESS WHEREOF, as directed in the aforesaid resolution, the City of Macon has caused these presents to be executed by the Mayor and the Clerk of Council and its seal affixed, this the 4th day of February, 1964.

THE CITY OF MACON

By B. F. Merritt, Jr.
Mayor of the City of Macon

Attest: Alex B. Cameron
Clerk of Council
City of Macon

(Seal of the City of Macon)

FILED IN OFFICE
5 day of Feb. 1964
Era B. Goodner
Deputy Clerk

[fol. 102]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

ACCEPTANCE OF TRUST—Filed March 12, 1964

Come now the undersigned, Hugh M. Comer, Lawton Miller and B. L. Register, and pursuant to the Order and Decree of Honorable O. L. Long, Judge, Superior Courts, Macon Circuit, dated March 10, 1964, hereby formally accept their appointment as successor Trustees under Items IX and X of the Last Will and Testament of Augustus Octavius Bacon, Deceased.

This 11th day of March, 1964.

Hugh M. Comer, Lawton Miller, B. L. Register.

[File endorsement omitted]

[fol. 103] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 105]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

REV. E. S. EVANS, et al., Plaintiffs-in-error,

—VS.—

CHARLES E. NEWTON, et al., Defendants-in-error.

MOTION TO AMEND BILL OF EXCEPTIONS—
Filed May 8, 1964

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Georgia:

Comes now the plaintiffs-in-error, Rev. E. S. Evans, et al. in the above-styled case which is before this Honor-

able Court by virtue of being an equity action from the Superior Court of Bibb County, who with leave of Court, and pursuant to Georgia Code Annotated, Sections 6-913, 6-1309, 6-1401, and 81-1301, amend page one (1) of their bill of exceptions by striking the designation of plaintiffs-in-error and defendants-in-error, respectively, and substituting therefor the following:

Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, Plaintiffs-in-error,

—vs.—

The City of Macon; A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, M. Barton Sparks, Heirs at law of A. O. Bacon; Guyton Adley, J. D. Crump, J. J. Denmark, Dr. W. G. Lee, Successor Trustees under the Will of A. O. Bacon; Hugh M. [fol. 106] Comer, Lawton Miller, and B. L. Register, Successor Trustees in lieu of the City of Macon, Defendants-in-error.

Wherefore, plaintiffs-in-error pray that this their amendment be allowed.

Donald L. Hollowell, William H. Alexander, Attorneys for Plaintiffs-in-Error.

[fol. 107] Certificate of Service (omitted in printing).

[fol. 108]

ORDER

The foregoing Amendment having been read and considered, the same is allowed and ordered filed.

....., Justice, Supreme Court of Georgia.

[fol. 109] [File endorsement omitted]

[fol. 110]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

[Title omitted]

SECOND MOTION TO AMEND BILL OF EXCEPTIONS—
Filed May 18, 1964

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Georgia:

Comes now the plaintiffs-in-error, Rev. E. S. Evans, et al. in the above-styled case which is before this Honorable Court by virtue of being an equity action from the Superior Court of Bibb County, who with leave of Court, and pursuant to Georgia Code Annotated, Sections 6-913, 6-1309, 6-1401, and 81-1301, amend page one (1) of their bill of exceptions by striking the designation of plaintiffs-in-error and defendants-in-error, respectively, and substituting therefor the following:

Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, Plaintiffs-in-error,

—vs.—

The City of Macon; A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, M. Barton Sparks, Heirs at law of A. O. Bacon; Guyton Adley, J. D. Crump, J. J. Denmark, Dr. W. G. Lee, Successor Trustees under the Will of A. O. Bacon; Charles [fol. 111] Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederic W. Williams, and Mrs. Kenneth Dunwoody, Members of the Board of Managers under will of A. O. Bacon; Hugh M. Comer, Lawton Miller, and B. L. Register, Successor Trustees in lieu of the City of Macon, Defendants-in-error.

Wherefore, plaintiffs-in-error pray that this their amendment be allowed.

D. L. Hollowell, William H. Alexander, Attorneys for Plaintiffs-in-Error.

[fol. 112] Certificate of Service (omitted in printing).

[fol. 113]

ORDER

The foregoing Amendment having been read and considered, the same is allowed and ordered filed.

....., Justice, Supreme Court of Georgia.

[fol. 114] [File endorsement omitted]

[fol. 115]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

[Title omitted]

MOTION OF CHARLES E. NEWTON, ET AL. TO SUBSTITUTE PARTIES DEFENDANT-IN-ERROR—Filed May 27, 1964

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Georgia:

Come now the defendants-in-error, Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody and for reasons which will hereinafter appear, pray that this Honorable Court substitute as parties defendant-in-error in place of Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody the four following named residents of Macon, Bibb County, Georgia:

A. M. Anderson
Mrs. Dan O'Callaghan
Mrs. R. A. McCord, Jr.
Mrs. W. E. Pendleton, Jr.

In support of this motion the movants respectfully show to this Court the following facts. After the Trial Court entered its order on March 10, 1964, appointing Hugh Comer, Lawton Miller and B. L. Register as Trustees of Baconsfield, movants herein tendered to these three new Trustees their resignations as members of the Board of Managers of Baconsfield. This joint resignation was sub-
[fol. 116] mitted to the Trustees on March 18, 1964.

Thereafter, on May 21, 1964, at a time when the record from the Trial Court had already been docketed in the Supreme Court of Georgia, a meeting was held at which the above named three Trustees formally accepted the resignations previously tendered to them and appointed a new Board of Managers to consist of the following persons:

A. M. Anderson
Mrs. Francis K. Hall
Mrs. R. A. McCord, Jr.
Mrs. Dan O'Callaghan
Mrs. W. E. Pendleton, Jr.
George P. Rankin, Jr.
Frank M. Willingham

These seven appointees thereupon accepted their appointments in writing.

A copy of the resignation of the members of the former Board of Managers is attached hereto as Exhibit "A". The acceptance of this resignation and the appointment of a new Board by the three Trustees and the acceptance of this appointment by the new Board of Managers is attached hereto as Exhibit "B". Movants hereby incorporate these two exhibits by reference.

Four of the seven positions on the Board of Managers are now filled by persons who did not serve on the Board as it was constituted at the time this case was docketed in

the Supreme Court of Georgia, and who have never served on the Board before.

Wherefore, movants pray that A. M. Anderson, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan and Mrs. W. E. [fol. 117] Pendleton, Jr. may be made parties defendant-in-error and that Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody may be stricken as parties defendant-in-error.

Jones, Sparks, Benton & Cork, Attorneys for Defendants-in-Error, Board of Managers of Baconsfield.

Address of Counsel:

1007 Persons Building, Macon, Georgia, SHerwood 5-2821.

[fol. 118]

GEORGIA, BIBB COUNTY.

ACKNOWLEDGMENT OF SERVICE, WAIVER AND CONSENT BY NEW BOARD MEMBERS

Come now A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., and Mrs. W. E. Pendleton, Jr., and ask that they may be substituted as parties defendant in error in accordance with the attached motion of Charles E. Newton, et al., acknowledge service of the bill of exceptions, waive all further service and notice and consent that the case may proceed.

This 21st day of May, 1964.

A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., Mrs. W. E. Pendleton, Jr.

[fol. 119]

EXHIBIT "A" TO MOTION TO SUBSTITUTE PARTIES DEFENDANT IN ERROR

GEORGIA, BIBB COUNTY.

RESIGNATION OF BOARD OF MANAGERS OF BACONSFIELD

Come now Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody, all of said State and County, in their respective capacities as members of the Board of Managers of Baconsfield and pursuant to the order of Honorable O. L. Long, Judge Superior Courts, Macon Circuit, dated March 10, 1964, the resignation of The City of Macon as Trustees under Items IX and X of the Last Will and Testament of Augustus Octavius Bacon, deceased, having been accepted; and three (3) individual Trustees having been appointed by the said Superior Court to serve in lieu of The City of Macon in said capacity, the undersigned do hereby tender to said Trustees their respective resignations as members of said Board of Managers of Baconsfield.

This 18th day of March, 1964.

/s/ CHARLES E. NEWTON, JR.

/s/ MRS. T. J. STEWART

/s/ FRANK M. WILLINGHAM

/s/ MRS. FRANCIS K. HALL

/s/ GEORGE P. RANKIN, JR.

/s/ MRS. FREDERICK W. WILLIAMS

/s/ MRS. KENNETH W. DUNWODY

[fol. 120]

EXHIBIT "B" TO MOTION TO SUBSTITUTE PARTIES DEFENDANT IN ERROR

GEORGIA, BIBB COUNTY.

ACCEPTANCE OF RESIGNATION OF BOARD OF MANAGERS

Come now Hugh M. Comer, Lawton Miller and B. L. Register and after due consideration formally accept the resignation of Charles E. Newton, Frank M. Willingham, George P. Rankin, Jr., Mrs. Francis K. Hall, Mrs. T. J. Stewart, Mrs. Frederick W. Williams, and Mrs. Kenneth W. Dunwody from the Board of Managers of Baconsfield, such resignation being dated March 18, 1964.

This the 21st day of May, 1964.

/s/ HUGH M. COMER
Hugh M. Comer

/s/ LAWTON MILLER
Lawton Miller

/s/ B. L. REGISTER
B. L. Register

APPOINTMENT OF NEW BOARD OF MANAGERS

Further, we, the said Hugh M. Comer, Lawton Miller and B. L. Register hereby appoint to the Board of Managers of Baconsfield for terms of office to begin immediately, the following persons: A. M. Anderson, Mrs. Francis K. Hall, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, Mrs. W. E. Pendleton, Jr., George P. Rankin, Jr., and Frank M. Willingham.

This the 21st day of May, 1964.

/s/ HUGH M. COMER
Hugh M. Comer

/s/ LAWTON MILLER
Lawton Miller

/s/ B. L. REGISTER
B. L. Register

[fol. 121]

ACCEPTANCE OF APPOINTMENT BY NEW BOARD

Come now A. M. Anderson, Mrs. Francis K. Hall, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, Mrs. W. E. Pendleton, Jr., George P. Rankin, Jr., and Frank M. Willingham and accept appointment to the Board of Managers of Baconsfield for terms to begin immediately.

This the 21st day of May, 1964.

/s/ A. M. ANDERSON
A. M. Anderson

/s/ MRS. FRANCIS K. HALL
Mrs. Francis K. Hall

/s/ MRS. R. A. MCCORD, JR.
Mrs. R. A. McCord, Jr.

/s/ MRS. DAN O'CALLAGHAN
Mrs. Dan O'Callaghan

/s/ MRS. W. E. PENDLETON, JR.
Mrs. W. E. Pendleton, Jr.

/s/ GEORGE P. RANKIN, JR.
George P. Rankin, Jr.

/s/ FRANK M. WILLINGHAM
Frank M. Willingham

[fol. 122]

ORDER GRANTING MOTION TO SUBSTITUTE PARTIES DEFENDANT, ETC.—June 6, 1964

The within motion having been presented to this Court and it being made to appear that A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr. and Mrs. W. E. Pendleton, Jr. have consented to be made parties defendant in error and have acknowledged service of the bill of exceptions and have waived all further service and notice and have consented that the case may proceed:

Wherefore, It Is Hereby Ordered and Adjudged that A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr. and Mrs. W. E. Pendleton, Jr. are made additional

parties defendant in error and that Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody are hereby stricken as parties defendant in error.

This the 6th day of June, 1964.

....., Presiding Justice, Supreme Court of Georgia.

[fol. 123]

Certificate of Service

Georgia, Bibb County.

I, Willis B. Sparks, III, of counsel of record for the defendants-in-error, the Members of the Board of Managers of Baconsfield, certify that I have served the foregoing motion and accompanying two exhibits and acknowledgment of service and waiver by the four new Board members and order upon the plaintiffs-in-error by mailing a copy of the same to their attorney of record, Donald L. Hollowell, at his office at 859½ Hunter Street, Northwest, Atlanta, Georgia.

I further certify that I have mailed a copy of all the above described documents to Mr. Jack Greenberg, 10 Columbus Circle, New York, New York, Mr. Greenberg appearing on the brief of the plaintiffs-in-error as co-counsel in the case.

I further certify that I have served the defendant-in-error, City of Macon, by mailing a copy of the said motion and the said two accompanying exhibits and the said acknowledgment of service and waiver by the four new Board members and order to its attorney of record, Trammell F. Shi, at his office in the Southern United Building in Macon, Georgia.

I acknowledge service on behalf of Guyton Abney, et al., as Successor Trustees under the Will of A. O. Bacon and I further acknowledge service for W. B. Sparks, Jr., et al., as the "Sparks heirs" of A. O. Bacon.

This the 26th day of May, 1964.

Willis B. Sparks, 3rd.

[fol. 124] [File endorsement omitted]

[fol. 125]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

REV. E. S. EVANS, LOUIS H. WYNN, REV. J. L. KEY, REV. BOOKER W. CHAMBERS, WILLIAM RANDALL, and REV. VAN J. MALONE, Plaintiffs-in-Error,

vs.

THE CITY OF MACON: A. O. B. SPARKS, JR., VIRGINIA LAMAR SPARKS, M. BARTON SPARKS, Heirs at Law of A. O. BACON; GUYTON ADLEY, J. D. CRUMP, J. J. DENMARK, DR. W. G. LEE, Successor Trustees under the Will of A. O. BACON; CHARLES NEWTON, MRS. T. J. STEWART, FRANK M. WILLINGHAM, MRS. FRANCIS K. HALL, GEORGE P. RANKIN, JR., MRS. FREDERICK W. WILLIAMS, and MRS. KENNETH DUNWOODY, Members of the Board of Managers under Will of A. O. BACON; HUGH M. COMER, LAWTON MILLER, and B. L. REGISTER, Successor Trustees in Lieu of The City of Macon, Defendants-in-Error.

MOTION TO ADD PARTIES DEFENDANT-IN-ERROR AND TO DENY DEFENDANTS-IN-ERROR'S MOTION TO SUBSTITUTE PARTIES DEFENDANT-IN-ERROR—Filed June 4, 1964

To the Honorable Chief Justice and the Honorable Justice of the Supreme Court of Georgia:

Come now the plaintiffs-in-error, Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone in the above-styled case and pray that this Honorable Court add the following named persons as defendants-in-error: A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., and Mrs. W. E. Pendleton, Jr., and deny the defendants-in-error's motion to substitute these named defendants-in-error in lieu of defendants-in-error Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, for the following reasons:

[fol. 126] The said motion filed in this Honorable Court by defendants-in-error Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwoody shows that they submitted their resignations as members of the Board of Managers of Baconsfield. This joint resignation was submitted to Hugh Comer, Lawton Miller, and B. L. Register, new trustees of Baconsfield, on March 18, 1964. The said resignations were accepted by the said Trustees on May 21, 1964. However, the appeal of this case to this Honorable Court by the plaintiffs-in-error was docketed in this Honorable Court on May 8, 1964. The said new trustees, having been notified that the appeal was docketed, had no authority to accept the resignation of the named defendants-in-error or to take any other action affecting the status of the parties or property involved in this case, pending a determination of the issues involved in this case by this Honorable Court. Therefore, plaintiffs-in-error submit that the attempted resignation by the named defendants-in-error was null and void.

Wherefore, plaintiffs-in-error pray that:

(1) A. M. Anderson, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, and Mrs. W. E. Pendleton, Jr., be made parties defendants-in-error; and

(2) The defendants-in-error's prayer that Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams, and Mrs. Kenneth W. Dunwoody be stricken as parties defendant-in-error, be denied.

Donald L. Hollowell, William H. Alexander, 859½ Hunter Street, Northwest, Atlanta, Georgia.

Jack Greenberg, James M. Nabrit, III, 10 Columbus Circle, New York, New York 10019, Attorneys for Plaintiffs-in-Error.

[fol. 127] Certificate of Service (omitted in printing).

[fol. 128]

ORDER

The foregoing motion having been read and considered, the same is allowed and ordered filed.

Wherefore, it is ordered and adjudged that A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., and Mrs. W. E. Pendleton, Jr. are made parties defendant-in-error. Further, the motion of the defendants-in-error to strike Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams, and Mrs. Kenneth W. Dunwoody, referred to in this motion, is denied.

This the day of June, 1964.

..... Justice, Supreme Court of Georgia.

[fol. 129] [File endorsement omitted]

[fol. 130]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

E. S. EVANS et al.,

v.

CHARLES E. NEWTON et al.

ORDER GRANTING SECOND MOTION TO AMEND THE BILL OF EXCEPTIONS, ETC.—September 25, 1964

Upon consideration of the second motion to amend the bill of exceptions by E. S. Evans et al., the designated plaintiffs in error in this case, filed in the Supreme Court on May 18, 1964, so as to substitute the plaintiffs in error designated in the said motion for those designated in the bill of exceptions and to substitute the defendants in error designated in the said motion for those designated in the

bill of exceptions, it is ordered that the said motion be hereby granted.

Let a copy of this order be mailed to counsel for each side.

[fol. 131]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

E. S. EVANS et al.,

v.

CHARLES E. NEWTON et al.

ORDER GRANTING MOTION BY CHARLES E. NEWTON ET AL., DEFENDANTS IN ERROR, ETC.—September 28, 1964

Upon consideration of the motion by Charles E. Newton et al., defendants in error in this case, to make A. M. Anderson, Mrs. R. A. McCord, Mrs. Dan O'Callahan and Mrs. W. E. Pendleton, Jr., parties defendant in error and to strike Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwoody as parties defendant in error, it is ordered that the said motion be granted in so far as it names additional parties defendant in error and is denied in so far as it seeks to strike parties defendant in error.

Let a certified copy of this order be mailed to counsel for each side.

[fol. 132]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

EVANS et al.,

v.

NEWTON et al.

The record does not support the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. The judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

Argued June 8, 1964

Decided September 28, 1964

Rehearing denied October 8, 1964.

Equitable petition. Bibb Superior Court. Before Judge Long.

[fol. 133]

OPINION—September 28, 1964

The will of A. O. Bacon (which was probated in solemn form) in Item Nine gave in trust described property, to be known as "Baconsfield," to named trustees for the benefit of his wife and two named daughters for their joint use, benefit, and enjoyment during the term of their natural lives. It was provided that upon the death of the last survivor, the property, including all remainders and reversions, "shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever

used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control" of a board of managers consisting of seven persons, not less than four to be white women and all seven to be white persons. In order to provide for the maintenance of the park, income from described real property and bonds was to be expended by the board of managers.

Charles E. Newton and others, as members of the Board [fol. 134] of Managers of Baconsfield, brought an equitable petition against the City of Macon (in its capacity as trustee under Item Nine of the will of A. O. Bacon), and Guyton G. Abney and others, as successor trustees under the will holding assets for the benefit of certain residuary beneficiaries. It was alleged: The city as trustee holds the legal title to a tract of land in Macon, Bibb County, known as Baconsfield, under Item Nine of the will of A. O. Bacon. As directed in the will, the board through the years has confined the exclusive use of Baconsfield to those persons designated in the will. The city is now failing and refusing to enforce the provisions of the will with respect to the exclusive use of Baconsfield. Such conduct on the part of the city constitutes such a violation of trust as to require its removal as trustee. It was prayed that: the city be removed as a trustee under the will; the court enter a decree appointing one or more freeholders, residents of the city, to serve as trustee or trustees under the will; legal title to Baconsfield and any other assets held by the city as trustee be decreed to be in the trustee or trustees so appointed [fol. 135] for the uses originally declared by the testator; and for further relief.

The City of Macon filed its answer asserting that it can not legally enforce racial segregation of the property known as Baconsfield, and therefore it is unable to comply with the specific intention of the testator with regard to maintaining the property for the exclusive use, benefit, and enjoyment of the white women, white girls, white boys, and white children of the city. The city prayed that the court construe the will and enter a decree setting forth the duties and obligations of the city in the premises. The other

defendants admitted the allegations of the petition and prayed that the city be removed as a trustee. The petitioners thereafter filed a motion for summary judgment.

Reverend E. S. Evans and others, alleging themselves to be Negro residents of the City of Macon, on behalf of themselves and other Negroes similarly situated, filed an intervention in the cause and asserted: The restriction and limitation reserving the use and enjoyment of Baconsfield [fol. 136] Park to "white women, white girls, white boys and white children of the City of Macon," is violative of the public policy of the United States of America and violative of the Constitution and laws of the State of Georgia. The court as an agency of the State of Georgia can not, consistently with the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and the equivalent provision of the Constitution of the State of Georgia, enter an order appointing private citizens as trustees for the manifest purpose of operating, managing, and regulating public property (which passed to the City of Macon under charitable trust created by will) in a racially discriminatory manner. Although the charitable device at the time of its creation was capable of being executed in the exact manner provided by the will, by operation of law it is no longer capable of further execution in the exact manner provided for by the testator. The court should effectuate the general charitable purpose of the testator to establish and endow a public park by refusing to appoint private persons as trustees.

By amendment to the petition it was alleged: By the [fol. 137] will of A. O. Bacon a trust was established for his heirs. The trust has been executed as to four of his seven heirs now living, A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks. The interests of three remaining heirs, Louise Curry Williams, Shirley Curry Cheatham, and Manley Lamar Curry, are still held under an executed trust by four trustees holding under the authority of the will, these trustees being Guyton Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee. These seven persons have an interest in the litigation since,

if the trust purpose expressed in the will with respect to the designation of persons who may use Baconsfield should fail, the property comprising Baconsfield, together with the property providing the upkeep of Baconsfield, will revert to the estate of A. O. Bacon and be distributed to these heirs. The amendment prayed that the Sparks heirs be allowed to intervene and that the trustees be allowed to assert the interests of the other heirs. It was also prayed that the Negro intervenors and other members of the Negro race resident in Macon be permanently enjoined from enter- [fol. 138] ing and using the facilities of Baconsfield. The Sparks heirs and the trustees of the other heirs of A. O. Bacon filed an intervention praying that the relief sought by the original petitioners be granted, but that if such relief not be granted, the property revert to them.

The City of Macon filed an amendment to its answer, alleging that pursuant to resolution adopted by the Mayor and Council of the city at its regular meeting on February 4, 1964, the city has resigned as trustee under the will of A. O. Bacon. It prayed that the resignation be accepted by the court.

The Negro intervenors filed an amendment to their intervention in which they asserted: The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits the court from enjoining Negroes from the use of the park, and from accepting the resignation of the City of Macon as trustee and appointing new trustees for the purpose of enjoining (enforcing?) the racially discriminatory provision in the will of A. O. Bacon. Code § 69-504 prescribes racial discrimination and is therefore [fol. 139] violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Since the racially discriminatory provision in the will was dictated by that unconstitutional statute, enforcement of the racially discriminatory provision is constitutionally prohibited. Code § 108-202, properly construed, requires that the racially discriminatory provision in the will be declared null and void. The intervenors prayed that the court withhold approval of the attempted resignation of the city as

trustee under the will, direct the city to continue to administer the park on a racially nondiscriminatory basis, and deny the injunction sought by the petitioners to exclude Negroes from the use of the park.

On March 10, 1964, the judge of the superior court entered an order and decree in the case which adjudged as follows: (1) The intervenors named are proper parties in the case and are proper representatives of the class which their intervention states that they represent, the Negro citizens of Bibb County and the City of Macon. (2) The defendants, Guyton G. Abney, J. D. Crump, T. I. Denmark, [fol. 140] and Dr. W. G. Lee, as successor trustees under the will of A. O. Bacon, and intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks are also proper parties. (3) The City of Macon having submitted its resignation as the trustee of the property known as Baconsfield, the resignation is accepted by the court. (4) Hugh M. Comer, Lawton Miller, and B. L. Register are appointed as trustees to serve in lieu of the City of Macon. (5) The court retains jurisdiction for the purpose of appointing other trustees that may be necessary in the future. (6) It is unnecessary to pass upon the secondary contention of the intervenors Guyton G. [Abney and others.

Reverend E. S. Evans and others in their writ of error to this court assign error on this order of the trial judge. Their contentions will appear from the opinion.

Donald L. Hollowell, William H. Alexander, Jack Greenberg, James M. Nabrit, III, for plaintiff in error.

Jones, Sparks, Benton & Cork, Trammell F. Shi, contra.

[fol. 141] ALMAND, Justice. Counsel for the plaintiffs in error (the Negro intervenors) assert that the decree of the judge of the superior court was "patent enforcement of racial discrimination contrary to the equal protection clause of the Fourteenth Amendment" to the Federal Constitution. The decree did not enforce, or purport to enforce, any judgment, ruling, or decree as related to the intervenors. After determining that all parties were properly before the court, the decree did two things: (1) Accepted the resignation of

the City of Macon as trustee of Baconsfield; and (2) appointed new trustees.

"The law of charities is fully adopted in Georgia . . . " Jones v. Habersham, 107 U.S. 174 (5) (2 SC 336, 27 LE 401). Under the law of this State any person may, by will, grant, gift, deed, or other instrument, give or devise property for any charitable purpose. Ga. L. 1937, p. 593 (Code Ann. § 108-207). Any public convenience might be a proper subject for a charitable trust. Code § 108-203. A charity once established is always subject to supervision and direction by a court of equity to render effectual its purpose. Code § 108-204. It is the rule that a charitable trust shall never fail for the want of a trustee. Code § 108-302.

Whether the will of A. O. Bacon, establishing a trust [fol. 142] for the operation of Baconsfield, contemplated by the language, "to the Mayor and Council of the City of Macon and *to their* successors" (italics ours), that the named trustee might resign, need not be determined. The City of Macon did resign, and the judge of the superior court was confronted with the commandment of Code § 108-302 that a trust shall never fail for the want of a trustee. Being empowered to appoint trustees when a vacancy occurs for any cause, *Thompson* v. *Hale,* 123 Ga. 305 (51 SE 383), *Harris* v. *Brown,* 124 Ga. 310 (2) (52 SE 610, 2 LRA (NS) 828), *Woodbery* v. *Atlas Realty Co.,* 148 Ga. 712 (98 SE 472), *Sparks* v. *Ridley,* 150 Ga. 210 (3) (103 SE 425), the judge exercised such power and appointed successor trustees.

The contention by counsel for the plaintiffs in error that Code § 69-504 required A. O. Bacon to limit the use of Baconsfield to the members of one race can not be sustained. Code § 69-504, in providing for gifts limited to members of a race, simply states that any person *may* "devise, give, etc." The law of Georgia does not by Code § 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color, or creed. Such limitation, however, standing alone, is not invalid, and this court has sustained a testa- [fol. 143] mentary charity naming trustees for establishing and maintaining "a home for indigent colored people 60

years of age or older residing in Augusta, Georgia." *Strother* v. *Kennedy,* 218 Ga. 180 (127 SE2d 19). A. O. Bacon had the absolute right to give and bequeath property to a limited class.

Counsel for the plaintiffs in error assert that: "As the City was unable to comply with the racially discriminatory direction of the trust, three alternatives were open to the lower court: (1) declare the racially discriminatory provision null and void; (2) remove the trustee (or accept its resignation) and appoint a non-governmental trustee; (3) declare failure of the trust." They insist that the judge should have chosen the first alternative.

Counsel for plaintiffs in error assert that the court should have applied the provisions of Code § 108-202 that when a valid charitable bequest is incapable for some reason of exact execution in the exact manner provided by the testator a court of equity will carry it into effect in such way as nearly as possible to effectuate his intention. The answer to this contention is: the application of the cy-pres rule, as provided in this Code section, was not invoked [fol. 144] by the primary parties to this case, and even if it be conceded (which we do not concede, see *Smith* v. *Manning,* 155 Ga. 209, 116 SE 813, and *Fountain* v. *Bryan,* 176 Ga. 31, 166 SE 766) that the intervenors could raise such issue, the facts before the trial judge were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of exact execution in the exact manner provided by the testator. There is no testimony in the record of any nature or character, that the board of managers provided by the will, can not operate the park pursuant to the terms and conditions of the will.

Counsel for the plaintiffs in error cite *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia,* 353 U.S. 230 (77 SC 806, 1 LE2d 792). In the *Pennsylvania* case the United States Supreme Court pointed out that the board which operated Girard College was an agency of the State of Pennsylvania by legislative act, and that the refusal to admit Negroes to Girard College was therefore discrimination by the State. Upon the return of

the case to the Supreme Court of Pennsylvania for further proceedings not inconsistent with the opinion, that court remanded the case to the Orphans' Court for further pro-
[fol. 145] ceedings not inconsistent with the opinion of the Supreme Court of the United States. The Supreme Court of Pennsylvania, on the second appearance of the case (see *Girard College Trusteeship,* 391 Pa. 434, 138 A2d 844), stated that the Orphans' Court construed the United States Supreme Court's opinion to mean that the Board of City Trustees was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of the founder, and the Orphans' Court entered a decree removing the Board as trustee of Girard College and substituting therefor thirteen private citizens, none of whom held any public office or otherwise exercised any governmental power under the Commonwealth of Pennsylvania. The Supreme Court of Pennsylvania affirmed this action on review, and again sustained action denying admission to Girard College by the Negro applicants. Counsel for the defendants in error cite *Girard College Trusteeship,* 391 Pa. 434, and strongly rely on this Pennsylvania case. (On review by the United States Supreme Court the motion to dismiss was granted, and treating the record as a petition for certiorari, certiorari was denied. *Pennsylvania* v. *Board of Directors of City Trusts of Pennsylvania,* 357 U.S. 570 (78 SC 1383, 2 LE2d 1546). A motion for rehear-
[fol. 146] ing was denied. (358 U.S. 858.) In so far as the *Girard College Trusteeship* case is applicable on its facts to the present case, it supports the rulings we have made.

The record does not sustain the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. This judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

Judgment affirmed. All the Justices concur.

[fol. 147]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

E. S. EVANS et al.,

v.

CHARLES E. NEWTON et al.

JUDGMENT—September 28, 1964

This case came before this court upon a writ of error from the Superior Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

[fol. 148]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Decided September 28, 1964

Docket No. 22534

REV. E. S. EVANS, LOUIS H. WYNN, REV. J. L. KEY, REV. BOOKER W. CHAMBERS, WILLIAM RANDALL, and REV. VAN J. MALONE, Plaintiffs-in-Error,

vs.

THE CITY OF MACON; A. O. B. SPARKS, JR., VIRGINIA LAMAR SPARKS, M. BARTON SPARKS, Heirs at Law of A. O. BACON; GUYTON ADLEY, J. D. CRUMP, J. J. DENMARK, DR. W. G. LEE, Successor Trustees under the Will of A. O. BACON; CHARLES NEWTON, MRS. T. J. STEWART, FRANK M. WILLINGHAM, MRS. FRANCIS K. HALL, GEORGE P. RANKIN, JR., MRS. FREDERIC W. WILLIAMS, and MRS. KENNETH DUNWOODY, Members of the Board of Managers under Will of A. O. BACON; HUGH M. COMER, LAWTON MILLER, and B. L. REGISTER, Successor Trustees in Lieu of The City of Macon, Defendants-in-Error.

No change. Denied. All the Justices concur.

MOTION FOR REHEARING—Filed October 5, 1964

Comes now Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, plaintiffs-in-error, and within the time allowed by law, file this their Motion for Rehearing in the above-stated case, and for grounds thereof, say:

1.

That plaintiffs-in-error believe that this Honorable Court has overlooked the following material fact in the record: Item 9th of the will of A. O. Bacon provides, *inter alia*, that certain property should be left in trust to the "Mayor and Council of the city of Macon, and to their successors". The said item also provides that "The Members of this Board [of Managers] shall first be selected and appointed by the Mayor and Council of the city of Macon, or by their [fol. 149] successors . . . ; and all vacancies on said Board shall be filled by appointments made by the Mayor and Council of the City of Macon . . . , upon nomination made by the Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors." Plaintiffs-in-error aver that the phrase "their successors" as used *supra* in the relevant context makes it quite clear that the successors referred to are the persons occupying the positions of Mayor and councilman of the city of Macon and not persons who have no official position or office with the City of Macon. A reading of the will in its entirety makes it clear to plaintiffs-in-error that it was the testator's intent that the Mayor and Council (or persons succeeding them in those positions) should remain as trustees under the will. Accordingly, the Bibb Superior Court did not effectuate the testator's intent by allowing the City of Macon to resign and was in error in so doing.

2.

That while the language in Georgia Code Annotated Section 69-504 appears to be permissive, the testator was in fact required to limit his beneficence to members of a

particular race. This requirement was the results of the said Code section plus the customs which prevailed at the time the testator's will was drawn. The said Code section cannot be read or properly understood unless done so with a realization that patterns of segregation which were fostered and perpetuated by the State, existed at the time the will was drawn. The plaintiffs-in-error respectfully refer this court to *Robinson* v. *Florida*, 84 S. Ct. 1693 (1964). In *Robinson*, the State statute did not require restaurants to segregate Negroes and whites. Nevertheless, the Court held that Florida, as did Georgia in the instant case, became involved to such a significant extent that the case must be held to reflect State policy requiring segregation contrary to the Fourteenth Amendment to the United States [fol. 150] Constitution. In reality, the use of precatory words in Section 69-504 does not mean that the testator had a choice in the instant case anymore than the restaurants did in the *Robinson* case.

Wherefore, movants pray that a rehearing be granted in this case and that the judgment of the court below be reversed.

Donald L. Hollowell, William H. Alexander, 859½ Hunter Street, N. W., Atlanta, Georgia 30314;

Jack Greenberg, James M. Nabritt III, 10 Columbus Circle, New York, New York 10019;

Attorneys for Plaintiffs-in-Error.

[fol. 151]

CERTIFICATE OF PROBABLE CAUSE FOR REHEARING

I, William H. Alexander, of counsel for plaintiffs-in-error in the foregoing case, do certify that, upon careful examination of the opinion of the Court in this case, I verily believe that the facts and the decision mentioned in the attached motion have been overlooked by the Court, which facts and decision are material, and, if considered would require a different judgment from that rendered.

I also certify that a copy of the foregoing motion for rehearing has been served upon opposing counsel of record,

Trammel F. Shi and Jones, Sparks, Benton and Cork, by placing a copy in the United States Mail, postage prepaid, addressed to said counsel at their address of record.

This 5th day of October, 1964.

William H. Alexander

Sworn to and subscribed before me this 5 day of October, 1964.

Mary E. Dobbs, Notary Public, Georgia State at Large. My Commission Expires June 22, 1968.

[fol. 152] [File endorsement omitted]

[fol. 153]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

22534

E. S. EVANS *et al.*,

v.

CHARLES E. NEWTON *et al.*

ORDER DENYING MOTION FOR REHEARING—October 8, 1964

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 154] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 155]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

E. S. EVANS, et al., Petitioners,

vs.

CHARLES E. NEWTON, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 22, 1964

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 5, 1965.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 22nd day of December, 1964.

[fol. 156]

SUPREME COURT OF THE UNITED STATES

No. 959—October Term, 1964

E. S. EVANS, et al., Petitioners,

v.

CHARLES E. NEWTON, et al.

ORDER ALLOWING CERTIORARI—April 26, 1965

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.